130-413-2

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. ~~1080.~~ 723

THE UNITED STATES, APPELLANTS,

vs.

JOSEPH M. CUMMING AND HAMILTON J. MILLER, SURVIVING PARTNERS OF THE LATE FIRM OF J. M. CUMMING & CO.

No. ~~1081.~~ 724

JOSEPH M. CUMMING AND HAMILTON J. MILLER, SURVIVING PARTNERS OF THE LATE FIRM OF J. M. CUMMING & CO., APPELLANTS,

vs.

THE UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

FILED SEPTEMBER 30, 1887.

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1 I.—*Petition.*—*Filed March* 26, 1885.—*J. R.*

In the United States Court of Claims.

JOSEPH M. CUMMING AND HAMILTON J. Miller, as surviving partners of the late firm of J. M. Cumming & Co.,
vs.
UNITED STATES.
No. 11,573. Petition.

To the honorable the judges of the said Court of Claims:

The plaintiffs herein, by way of petition, allege as follows:

I. That the above-named Joseph M. Cumming, Hamilton J. Miller, and one William McRoberts were in the year 1867 and prior thereto co-partners in business together, under the name, style, and firm of J. M. Cumming & Co.

II. That during the said 1867 the same firm carried on business in the city of New York as manufacturers, distillers, vendors, and exporters of whiskeys and alcohols; having their New York place of business
2 at 58 and 60 Broad street, in said city, and having their manufactory in Cincinnati, Ohio, and having their distillery at Covington, Kentucky, the same being known as the "Willowrun" distillery, and having another distillery at Peoria, Illinois, for the manufacture of alcohols for export.

That the whiskeys and alcohols from these various distilleries were consigned from thence to the city of New York, where the same were placed in bond under the supervision and direction of the internal revenue officers of the United States.

III. That at the time of the seizure and wrongful acts hereinafter set forth said firm had in the United States bonded warehouses, 58 and 60 Broad street, in the city of New York, a large quantity of whiskey stored, subject to the revenue taxes of the United States, and the order of these petitioners to wit, upwards of eighteen thousand barrels, of great value to wit, of the value of about one million and a quarter dollars exclusive of the governmental tax.

IV. That in the manufacture, consignment, and storage of the said goods in bond all the provisions of the acts of Congress in regard to the internal revenue were observed and performed.

V. That while carrying on business as aforesaid, in strict conformity to the laws of the State of New York and those of the United States, and on or about the first day of September, 1867, one Joshua F. Bailey, collector of internal revenue of the United States for the fourth collection district of the State of New York, by virtue of a general authority vested in him by the Government of the United States, seized the aforesaid property in the name of the United States for an alleged violation of the revenue laws thereof; that the said Bailey not only seized the aforesaid property, but in addition thereto seized and took possession, and in the name and by the authority of the defendant carried away the books, papers, and correspondence of the said firm, and denied them all control thereof, and pre-
3 vented them from having any control over their aforesaid property, and that said books, papers, and correspondence have never been returned.

That said Bailey, in addition to the said seizure, effectually closed and stopped the business of the said firm, and expelled said firm from their place of business, in consequence of which the petitioners were thereafter disabled from transacting and carrying on business.

VI. That the said whiskeys so seized and taken possession of by the said Bailey, in the name and authority of the said United States, were retained by the said Government of the United States, and in and under its control for a long period of time thereafter, to wit, until about February, 1868, when part thereof only was returned, and that the portion so returned was in an injured, diminished, and depreciated condition.

VII. That said seizure was wrongful, without cause, and was made, carried out, and consummated solely by virtue and authority of the United States, delegated to the said Bailey as aforesaid.

VIII. That prior to and at the time of the said seizure the said firm of J. M. Cumming & Co. were doing a large, prosperous, and lucrative business in the city of New York, having a large domestic and export trade, and that the profits arising from the same amounted to about the sum of three hundred thousand dollars per year.

That the whiskeys and alcohols manufactured, distilled, sold, consigned, and exported by the said firm were well and favorably known, not only in the United States, but elsewhere, and that the name and credit of the said firm was of great value, affording, as it did, a ready sale for their well-known commodities.

That the credit of the said firm among the commercial and financial men, banks, and bankers in the State of New York stood high, which added to the prosperous financial and business character of the said firm, gave it high standing in said city of New York and elsewhere, as aforesaid.

4 That the said firm were constantly engaged in selling and in exporting their said whiskeys and alcohols, and were always prompt in making their deliveries and exports, and in furnishing a good quality of goods, all of which tended to establish and continue their good name and business credit aforesaid.

That the business was well established, the firm well known, its goods highly appreciated, and that its business was increasing and growing, and would have increased to a very large extent if the same had not been broken up, ruined, and destroyed by the acts of the said United States Government through its accredited agent aforesaid.

That the business carried on as aforesaid exceeded three millions of dollars per year, and was on the increase and would have increased but for the wrongful acts aforesaid.

IX. That the said United States, well knowing the premises, through its accredited agent aforesaid, and by means of the seizure, stoppage of the business, and wrongful acts aforesaid, effectually prevented these petitioners from carrying on their said business, ruined their credit and commercial standing, and prevented them not only from carrying out contracts of sales and exports already made, but prevented them from obtaining new orders or contracts, or doing any business whatsoever.

X. That the said United States, through its accredited agent aforesaid, not only seized the aforesaid eighteen thousand barrels of whiskey, but seized fifteen hundred barrels of superior old whiskeys of well-known

brands not subject to Government tax, and worth in the market about eight dollars per gallon, and that the said whiskeys when subsequently released by the said United States had so depreciated in value from evaporation, leakage, and decline in the market, and had been so injured by the acts of the defendant, that the same were worth and brought only from $1.75 to $2 per gallon.

XI. In addition to this general damage and the general damage arising from the injurious acts of the said United States aforesaid, and the depreciation consequent thereupon, the petitioners by virtue of special and consequential damages allege and aver that in consequence of the wrongful acts aforesaid they lost the rent of—

Stores Nos. 58 and 60 Broad street, then under a rental of $10,000 per annum (actual loss)	$5,000.00
Salary of bookkeeper, at $2,500 per annum (actual loss)	1,250.00
Salary of warehouseman, at $1,200 per annum (actual loss)	600.00
Salary of Thomas Miller, representing Boyd, Miller & Co., of Cincinnati, at $5,250 (actual loss)	2,625.00
Salary of bonded clerk, at $1,500 per annum (actual loss)	750.00
Salary of first assistant clerk, at $1,200 per annum (actual loss)	600.00
Salary of second assistant clerk, at $1,000 per annum (actual loss)	500.00
Salary of bonded storekeeper, 182 days, at $4 per day (actual loss)	728.00
Expenses of gauging, examining, labor, &c. (actual loss)	2,500.00
Fire insurance on stock (actual loss)	1,200.00
	$15,753.00

That at the times aforesaid these petitioners were under contract obligations to pay the said rent, and pay the aforesaid salaries, and that the gauging, examining, labor, &c., were done and performed by and under the direction of the officials of the said United States, selected by it for the purpose of testing the accuracy of the books of the United States warehouse keeper in respect to the aforesaid whiskeys, all of which, on examination, tallied and corresponded in every respect with the whiskeys on hand, and all of which showed and proved that no wrong of any kind had been committed by the petitioners upon the internal revenue laws of the United States, or against the said United States.

That the Government of the said United States was informed of the accuracy of the said books, and that they tallied with the whiskey of the petitioners in bond as aforesaid, and that such information was given by officials selected by the said Government to make such a report; and still the said United States, in affirmation of the aforesaid acts of the said Bailey, through the officers of the Internal Revenue Department continued the said seizure, and deprived the said petitioners of their property and prevented them from obtaining possession thereof for a long time thereafter and until a second examination was made under the direction of the defendant, both of which resulted in finally proving to the satisfaction of the said Government that no wrong of any kind against the

revenue or other laws of the United States had been committed by these petitioners.

That the said petitioners sustained a loss on the eighteen thousand barrels of whiskeys aforesaid by depreciation, fall in the market, evaporation, leakage, and injury, and the like, amounting to the sum of $360,000, and that they sustained a loss on the fifteen hundred barrels of old superior whiskeys by depreciation and the like, amounting to the sum of $360,000, and that the sum of $1,200 hereinbefore referred to was paid by the petitioners for fire insurance on the aforesaid stock, while in the custody of the said United States under the seizure aforesaid.

That by reason of the destruction of the business of said petitioners they were injured in their good name and reputation as a firm, and were prevented from making profits which they otherwise would have made on contracts then existing and which they might, could have and would have made, but for the wrongful seizure aforesaid, and that such loss and damage amounts to at least the sum of $600,000.

XII. That notice of the aforesaid claim was given to the said United States and yet the same has not been paid, nor any part thereof, and that the petitioners are entitled to recover the aforesaid damages as they have been advised and believe.

7 XIII. That by an act of Congress approved February 26th, 1885, these petitioners were permitted to bring action against the said United States in the Court of Claims to recover the aforesaid demand and that a copy of the said act is hereto annexed and is made a part of this petition; and that jurisdiction thereby was conferred upon this court to hear and determine the same.

That said act passed both Houses of Congress and received the approval of the President, and became a law of the United States on the 26th day of February, 1885.

XIV. That the plaintiffs and all the members of their firm were, at all times aforesaid, citizens and residents of the United States, and that they have at all times borne true faith and allegiance to the Government of the United States, and they did not, in any way, voluntarily aid, abet, or give encouragement to rebellion against the said Government.

That the petitioners, as surviving members of their said firm, jointly own the aforesaid claims and demands, and that their interest therein results from their ownership of the property and business aforesaid prior to and at the time of its seizure.

That the legal representative of their deceased partner will have an interest in the recovery herein after the same is collected and reduced to possession by these petitioners, and after all the debts and obligations of said firm are paid by these petitioners (if any should still appear existing or unpaid).

That their said deceased partner departed this life on or about the 7th day of January, A. D. 1876, and that Edward Amann, as his executor, represents his estate, but will make no claim to the damage claimed herein until the same have been reduced into possession by these petitioners as surviving members of said firm and until said firm's obligations, if any, are discharged; and that the recovery here sought has the sanction and approval of the said legal representative.

XV. That these plaintiffs are the only persons entitled thereto
8 to the recovery herein, and that there are no credits or offsets thereto, and that the plaintiffs are justly entitled to the amount claimed from the United States as they have been advised and believe.

Wherefore the petitioners pray for judgment herein for the aforesaid claims, aggregating the sum of one million, six hundred and thirty-five thousand, seven hundred and fifty-three ($1,635,753) dollars, with lawful interest from the time of said seizure, computed upon the actual loss suffered, and which interest is claimed by way of damages directly resulting from said wrongful acts.

The petitioners also pray that they be awarded the costs of the present proceeding.

JOSEPH M. CUMMING,
HAMILTON J. MILLER,
Petitioners.

MICHAEL JACOBS,
Attorney for petitioners, 335 Broadway, New York City, N. Y.

STATE OF NEW YORK,
City and County of New York, ss:

On this 16th day of March, 1885, before me personally appeared Joseph M. Cumming, one of the petitioners herein, who made oath that he knows the contents of the foregoing petition, and that the same are true of his own knowledge except as to those matters therein stated to be alleged upon information and belief, and as to those matters he believes the same to be true.

JOSEPH M. CUMMING.

Sworn, taken, and subscribed to before me this 16th day of March, 1885.

[SEAL.]

HERMAN FOX,
Notary Public, N. Y. Co.

9 STATE OF NEW YORK, *City and County of New York, ss:*

I, PATRICK KEENAN, clerk of the city and county of New York, and also clerk of the supreme court for the said city and county, the same being a court of record, do hereby certify that Herman Fox, before whom the annexed deposition was taken, was at the time of taking the same a notary public dwelling in said city and county, duly appointed and sworn and authorized to administer oaths to be used in courts in said State, and for general purposes, and that his signature thereto is genuine, as I verily believe.

In witness whereof I have hereunto set my hand and affixed the seal of the said court and county this 25th day of March, 1885.

[SEAL.]

PATRICK KEENAN,
Clerk.

STATE OF OHIO, *City of Cincinnati, ss:*

On this 21st day of March, 1885, before me personally appeared Hamilton J. Miller, one of the petitioners herein, who made oath that he knows the contents of the foregoing petition, and that the same are true of his

own knowledge except as to those matters therein stated to be alleged upon information and belief, and as to those matters he believes the same to be true.

HAMILTON J. MILLER.

Sworn, taken and subscribed to before me this 21st day of March, 1885.
[SEAL.] H. R. PROBASCO,
U. S. Commissioner, So. Dist. Ohio.

10 [PRIVATE—No. 113.]

AN ACT for the relief of Joseph M. Cumming, Hamilton J. Miller, and William McRoberts.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That Joseph M. Cumming, Hamilton J. Miller, and William McRoberts, late copartners in the business of commission merchants and bonded warehousemen in the city of New York, be permitted to sue in the Court of Claims; which court shall pass upon the law and facts as to the liability of the United States for the acts of its officer, Joshua F. Bailey, by reason of the seizure, detention, and closing up of the commission houses and bonded warehouses of said copartners, for the breaking up and interruption of their said business, and for the seizure and detention of the property, books, and papers in and connected with said business, by Joshua F. Bailey, collector of internal revenue for the fourth internal-revenue district of said State, or by said Bailey and other internal-revenue officers. The United States shall appear to defend against said suit, and either party may appeal to the Supreme Court as in ordinary cases against the United States in said court; and said suit may be maintained, any statute of limitation to the contrary notwithstanding.

Approved, February 26, 1885.

Department of State, March 5, 1885.

A true copy.

SEVILLON A. BROWN,
Chief Clerk.

11 II.—*Traverse.*

In the Court of Claims of the United States, December term, A. D. 1884.

CUMMINGS & MILLER
vs.
THE UNITED STATES. } No. 14573.

And now comes the Attorney-General, on behalf of the United States, and, answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimants have at all times borne true faith and allegiance to the Government of the United States, and ha not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

THOMAS SIMONS,
Assistant Attorney-General.

Filed April 9, 1885.—J. R.

12 III.—*Findings of fact.—Conclusions of law.*

Court of Claims.

JOSEPH M. CUMMING *et al.*
v.
THE UNITED STATES. } No. 14573.

FINDINGS OF FACT.

The court upon the evidence in this case finds the following facts:

I.

During the month of September, 1867, and for a long time prior thereto the firm of J. M. Cumming & Co., wholesale liquor dealers, occupied the building in the city of New York known as No. 60 Broad street, and a part of the building known as 58 Broad street. Joseph M. Cumming, one of the firm, was authorized to keep a bonded warehouse under the internal-revenue laws on the premises. The basement of the building No. 60 was used by the firm for the storage of free goods, that is to say, of whisky and liquor manufactured anterior to the laying of an internal-revenue tax, or of liquor upon which the tax had been paid. The first floor was used as their place of business. The upper floors of the two buildings constituted the bonded warehouse of J. M. Cumming & Co., in which the goods of the firm were stored and bonded. At this time and previously Hamilton J. Miller and William M. Roberts, two of the partners, were likewise partners in the firm of Boyle, Miller & Co., of Cincinnati, and as such were engaged in the production of distilled spirits in Cincinnati, Covington, and Peoria. It does not appear that J. M. Cumming was interested in the firm of Boyle, Miller & Co., or that he was in any way engaged in the production, redistillation, or rectification of distilled spirits. The following are the application, the bond, the approval, and the authority under which Cumming was keeping a bonded warehouse on the premises referred to:

Application of J. M. Cumming, with accompanying papers, for the creation of a bonded warehouse, Class B, at No. 60 Broad st., New York.

81 BEAVER STREET,
(OVER INTERNAL REVENUE EXPORT OFFICE)
New York, April 8, 1867.

SIR: I desire to have established as a bonded warehouse, Class B, for the general storage of distilled spirits in bond under the internal revenue acts, a portion of the store situated at No. 60 Broad street, in this city, and in your collection district.

The entire building is 25 feet wide by 80 feet deep, four stories high, with a cellar underneath it; is of brick, built in agreement with the requirements of the fire laws; has a slate roof, and iron shutters in the rear.

The portion which I wish to bond is the first, second, and third lofts, or second, third, and fourth floors, the dimensions of each being, from outside to outside, 25 by 80 feet, capable of storing about 1,700 barrels of

spirits in all. The cellar is occupied for the storage of general merchandise, and the first floor as a store for the transaction of business in general merchandise. The premises are adjoined on either side by similar fireproof stores. One of these stores, No. 58, is occupied by me, and a portion of it is bonded for the general storage of distilled spirits in bond under the internal revenue laws. The bonded portion of that store will be made to connect with No. 60, or with that portion of No. 60 for the bonding of which this application is made.

13 As to insurance, the building is rated first class. The required certificate of officers of two insurance companies, that the premises for the bonding of which this application is made are suitable for the purpose applied for and are insured at the lowest rates, is subjoined hereto.

Very respectfully, your obedient servant,

JOSEPH M. CUMMING.

Hon. SHERIDAN SHOOK,
Collector Internal Revenue 32nd District, New York.

Bond.

Know all men by these presents, that we, Joseph M. Cumming, residing at No. 174 Second avenue, New York City, as principal, and Thomas Thacher, residing at 108 East 36th st., New York City, and Andrew Gross, residing at 27 Park avenue, N. Y. City, as sureties, are held and firmly bound unto the United States of America in the sum of fifty thousand dollars, for the payment of which, well and truly to be made to the United States, we bind ourselves, our heirs, executors, and aministrators, jointly and severally, by these presents, as witness our hand and seals, at New York, this tenth day of April, eighteen hundred and sixty-seven.

The condition of this obligation is such, that if the above-bounden principals, or either of them, or either of their heirs, executors, administrators, or assigns, shall comply in all respects with the provisions and requirements of the warehousing and internal-revenue laws and the regulations of the Treasury Department made in pursuance thereof, and exonerate and hold the United States and its officers harmless from or on account of any risk, loss, or expense of any kind or description connected with or arising from the deposit or keeping of any goods, wares, or merchandise that may be deposited in the warehouse herein described, under the provisions of any law now existing or hereafter enacted, or that may be deposited therein after being seized or distrained under the internal-revenue laws, and shall not store in the warehouse known as the bonded warehouse of Joseph M. Cumming, situated at No. 60 Broad st., New York City, any other goods, wares, or merchandise than those duly bonded for warehousing and designated to be deposited in such warehouse by the internal-revenue laws, and ordered to be deposited therein by the collector or by his officer in charge, or those seized or distrained under the internal-revenue laws, and shall pay to the proper officer, monthly, the salary of the officer or officers in charge of said goods, wares, and merchandise, and shall safely keep all goods stored therein, and shall deliver the same to the order of the collector of interal revenue. looking to the owner of said goods for the storage and charges, and shall not remove nor suffer to be removed from said warehouse any goods, wares, or merchandise stored

therein without lawful permit, and without the presence of the officer having custody thereof, or, in case of such removal, shall pay to the collector of internal revenue for the district the value of the merchandise so removed, and five thousand dollars as liquidated damages for such removal, then this obligation to be void; otherwise in full force and virtue.

JOSEPH M. CUMMING.
THOMAS THACHER.
ANDREW GROSS.

Approval.

INTERNAL REVENUE,
32d COLLECTION DISTRICT, STATE OF NEW YORK,
New York, April 10, 1867.

HUGH MCCULLOCH,
Secretary of the Treasury:

SIR: I have examined into the matter of the penalty as prescribed in the bond given by J. M. Cumming for bonding the warehouse at No. 60 Broad street, in this city, and also as to the responsibility of the obligors therein named, and am satisfied that the penalty is ample, and the obligors perfectly responsible and abundantly able to respond in case of non-compliance of any of the conditions of said bond. I am also of opinion that the application of J. M. Cumming should be granted.

Very respectfully, yours,

SHERIDAN SHOOK,
Collector.

Appointment.

TREASURY DEPARTMENT, *April 15th*, 1867.

SIR: There have been received at this Department the application of J. M. Cumming, esq., dated April 8, 1867 (with accompanying pa-
14 pers), for the creation of certain premises, to wit, the 1st, 2d, and 3d lofts of premises situated No. 60 Broad street, N. Y. City, in the 32d collection district of N. Y., to be a bonded warehouse of class B, under the U. S. internal-revenue laws, for the general storage of goods as provided in said laws (petroleum and its products excepted), together with your certificate of examination and recommendation, dated April 12, 1867, that the Secretary approve said application and its accompanying certified copy of bond.

You are respectfully informed that, by direction of the Secretary, said application is hereby granted, and the certified copy of the bond pertaining thereto hereby approved, of which you will please notify the collector of said district.

The papers in this case are herewith returned.

Very respectfully,

J. F. HARTLEY,
Assistant Secretary of the Treasury.

To the COMMISSIONER OF INTERNAL REVENUE.

II.

In consequence of the Internal Revenue Regulations, Series 3, August 29, 1867, forbidding any other business in distilled spirits to be carried on in a building used as a bonded warehouse, and requiring that none of the warehousemen should be engaged in the production of distilled spirits, Thomas Miller, a clerk or superintendent of Cumming & Co., on the 12th September, 1867, applied to the collector of the thirty-second district for authority to keep a bonded warehouse at 58 and 60 Broad street; and the claimants, Joseph M. Cumming and Hamilton J. Miller, were his bondsmen. This application was approved by the collector, and on the 28th September, 1867, the appointment was made by the Secretary of the Treasury. Miller did not, in fact, own the warehouse, nor have any right of property or possession therein, the buildings being rented by Cummings & Co., who continued in the occupancy as stated in subsequent findings, and paid the rent thereof while Miller continued to be a clerk in their employment. It does not appear that these facts of Cummings & Co.'s interest in the premises, and of Miller being one of their clerks or employés, were either disclosed to or concealed from the collector and Internal Revenue Department at the time of application. The following are the application, approval, bond, and appointment above referred to:

Application of Thomas Miller, with accompanying papers, for the creation of premises 58 and 60 Broad street, New York, as a bonded warehouse, Class B.

NEW YORK, *September 12th*, 1867.

SIR: I desire to have established as a bonded warehouse, Class B, for the general storage of distilled spirits in bond under the internal-revenue acts, the premises situated at and known as Nos. 58 and 60 Broad street, in the city of New York, and in your collection district.

These premises are on the west side of Broad st., between Beaver st. and Exchange Place, are built of brick, four stories high, with a cellar under each; each has metallic roof, iron shutters and doors. The cellar of No. 58 is 110 by 21 feet, the first and second floors are 80 by 21 feet, the third floor is 110 by 21 feet, the fourth floor is 80 by 21 feet; the cellar of No. 60 is 110 by 22 feet 5 inches; the first, second, third, and fourth floors are each 80 by 22 feet 5 inches. The whole are capable of storing 5,524 bbls. of distilled spirits.

The buildings are adjoined on either side by similar stores. They are rated as to insurance first class by the standard surveys of the New York Board of Fire Insurance Companies, having been erected in agreement with the requirements of the fire laws.

The required certificate of officers of two insurance companies is subjoined hereto.

Very respectfully, your obedient servant,

THOS. MILLER.

5,524 bbls.=$62,500.

Hon. SHERIDAN SHOOK,
Collector of Int. Rev. 22nd Dist., New York.

15 *Approval.*

UNITED STATES INTERNAL REVENUE,
COLLECTOR'S OFFICE, 32D DISTRICT, NEW YORK,
New York City, Sept. 20, 1867.

This is to certify that the number of warehouses, Class B, already established in my district is not sufficient, and that the establishing of an additional bonded warehouse is absolutely necessary for the storage of bonded goods which may arrive or be produced in this dist.

I also certify that Thomas Miller, the applicant for bonded warehouse No. 58 and 60 Broad st., New York City, is not engaged in the production, redistillation, or rectification of distilled spirits.

I also certify that the building offered as a bonded warehouse is satisfactory in respect to location, construction, dimensions, and the means provided for receiving safe custody of the merchandise; whatever may be stored therein, is in every particular in accordance with law and the regulations of the Department.

SHERIDAN SHOOK,
Collector.

Bond.

Know all men by these presents that I, Thomas Miller, as principal, and Hamilton J. Miller and Andrew Gross and Joseph M. Cumming, as sureties, are held and firmly bound unto the United States of America in the sum of sixty-eight thousand dollars, for the payment of which, well and truly to be made to the United States, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents, as witness our hands and seals at New York this twelfth day September, eighteen hundred and sixty-seven.

The condition of this obligation is such, that if the above-bounden principals, or either of them, or either of their heirs, executors, administrators, or assigns, shall comply in all respects with the provisions and requirements of the warehousing and internal revenue laws, and the regulations of the Treasury Department made in pursuance thereof, and exonerate and hold the United States and its officers harmless from or on account of any risk, loss, or expense of any kind or description connected with or arising from the deposit or keeping of any goods, wares, or merchandise that may be deposited in the warehouse herein described, under the provisions of any law now existing or hereafter enacted, or that may be deposited therein after being seized or distrained under the internal revenue laws, and shall not store in the warehouse known as (Nos. 58 and 60 Broad st's) bonded warehouse of Thomas Miller, situated in New York, any other goods, wares, or merchandise than those duly bonded for warehousing and designated to be deposited in such warehouse by the internal revenue laws, and ordered to be deposited therein by the collector in charge, or those seized or distrained under the internal revenue laws, and shall pay to the said collector, monthly, the salary of the officer or officers in charge of said goods, wares, and merchandise, and shall safely keep all goods stored therein, and shall deliver the same to the order of the collector of internal revenue, looking to the owner of said goods for the storage and charges, and shall not remove, or suffer to be removed, from said

warehouse any goods, wares, or merchandise stored therein without lawful permit, and without the presence of the officer having custody thereof, or, in case of such removal, shall pay to the collector of internal revenue for the district the tax upon the merchandise so removed, and in addition thereto the value of the goods, wares, and merchandise so removed, and five thousand dollars as liquidated damages for each such removal, then this obligation to be void; otherwise to be and remain in full force and virtue.

THOMAS MILLER.
HAMILTON J. MILLER.
ANDREW GROSS.
JOSEPH M. CUMMING.

Appointment.

TREASURY DEPARTMENT, *Sept. 28th*, 1867.

SIR: There have been received at this Department the application of Thomas Miller, esq., dated September 12, 1867 (with accompanying papers), for the creation of certain premises, to wit, the four-story brick building situated No. 58 and 60 Broad street, N. Y. City, in the 32d collection district of N. Y., to be a bonded warehouse of Class B, under the U. S. internal revenue laws for the general storage of goods, as provided in said laws (petroleum and its products excepted), together with your certificate of examination and recommendation, dated Sept. 26, 1867, that the Secre-
approve said application and its accompanying certified copy of bond.
16 You are respectfully informed that said application is hereby granted, and the certified copy of the bond pertaining thereto hereby approved, of which you will please notify the collector of said district.

The papers in this case are herewith returned.

Very respectfully,

H. MCCULLOCH,
Secretary of the Treasury.

To the COMMISSIONER OF INTERNAL REVENUE.

III.

In October, 1867, one Conatty was a revenue officer acting under Joshua F. Bailey, collector of the fourth internal-revenue district. On the 17th October, 1867, the following letter was sent by the Commissioner of Internal Revenue to the said collector:

TREASURY DEPARTMENT,
OFFICE OF INTERNAL REVENUE,
Washington, October 17th, 1867.

MY DEAR SIR: I went with Mr. Conatty to the Secretary, and to the Secretary I read your letter to me, and we there had conference in relation to its subject-matter.

One object to be attained by the organization of the revenue board in New York was to correct existing jealousies between local officers and obviate complaints from collectors that neighboring collectors and their deputies were authorized to make seizures in their districts.

In the instrument signed by the Secretary and myself, under which the board was organized, it was provided that "Such revenue officers as may be designated by said board will be specially authorized by the Commissioner of Internal Revenue to make seizures within said districts, and are hereby required to report all seizures made to the said board and also to the collector of the district in which any seizures are made, and all special authority heretofore conferred on any officer to seize property within the said districts, or either of them, is hereby revoked."

Now to give authority to your deputies to seize outside your district would be in violation of the arrangement made at the organization of the board, and precedent would be established under which serious trouble might hereafter arise. I have accordingly sent three authorizations, with blank address, to Mr. Parnell who will fill the same with the approval of the board upon your recommendation.

Mr. Parnell and his associates will co-operate with you, I am sure, by every means in their power for the enforcement of the law and the punishment of fraud.

I have talked very fully to Mr. Conatty upon the whole subject and he will report to you.

Both the Secretary and myself earnestly desire to fully sustain efficient officers.

Very truly yours,

E. A. ROLLINS,
Commissioner.

J. F. BAILEY, Esq.,
Collector 4th Dist., New York.

On the 7th November, 1867, the following letter was sent by Collector Bailey, of the 4th district, to Collector Shook, of the 32d, in which district the bonded warehouse 58 and 60 Broad street was situated:

61 CHAMBERS ST., 7 *Nov.*, '67.

SIR: I will thank you to give an order to allow Inspectors Barrows & Conatty, with a general inspector, to visit the warehouses of Cumming & Co., as I have reason to believe that a fraud on the revenue is being practiced there.

I am, respt. and truly,

J. F. BAILEY,
Collector.

SHERIDAN SHOOK,
Collector 32 Dist.

17 On the 21st November, 1867, the following letters were sent by Collector Bailey to Collector Shook:

61 CHAMBERS STREET,
OFFICE OF COLLECTOR OF INTERNAL REVENUE,
New York, 21 *Nov.*, 1867.

SIR: I have to request that you will direct all shipments from the warehouse of Cumming & Co., 60 Broad street, to be suspended. There

are irregularities connected therewith that require thorough examination, and it is requisite to this end that removals should not be allowed.

I am, respect. and truly,

J. F. BAILEY,
Collector.

SHERIDAN SHOOK, Esq.,
Collector 32 Dist.

[61 Chambers street, office of collector of internal revenue, fourth district, State of New York.]

NEW YORK, 21 *Nov.*, 1867.

SIR: Will you please to authorize Mr. Barrows to visit the warehouse of Cumming & Co., Broad st., and also to compare with the bonded books.

Respt.,

J. F. BAILEY,
Collector.

SHERIDAN SHOOK, Esq.,
Collector 32 Dist.

On the 22d November, 1867, Deputy Collector Wm. H. Barrows made a report in writing to Collector Bailey, setting forth certain alleged irregularities in the bonded warehouse 58 and 60 Broad street.

On the 22d November, 1867, James Moncrief, esq., a lawyer in New York, on behalf of the claimants, sent the following letter to Collector Shook:

[Law office of James Moncrief, Nos. 5 and 7 Nassau street, between Wall and Pine str's.]

NEW YORK, 22*d Nov.*, 1867.

SHERIDAN SHOOK, Esq.,
Collector of Internal Revenue:

SIR: As counsel for Messrs. J. M. Cumming & Co., of Nos. 58 and 60 Broad street, in your district, I wish you officially to state the reason for free whisky being found upon the premises—the two stores now being a bonded warehouse. An early reply will oblige.

Yours, respect.,

JAS. MONCRIEF.

On the 23d November, 1867, Collector Bailey made the following report to the Commissioner of Internal Revenue:

[61 Chambers street, office of collector of internal revenue, fourth district, State of New York.]

NEW YORK, 23*d Nov.*, 1867.

SIR: In the matter of seizure of Cumming & Co., 60 Broad st., I have to report that a thorough examination of their bonded warehouse has been made by Deputy Wm. H. Barrows, and irregularities of the grossest character have been proven. I did not feel warranted until the 15th inst. in making a seizure, although there were sufficient facts in my possession to warrant whatever degree of surveillance might be necessary. On the 15th I sent an order to keeper who had been placed on their

premises for observation not to allow removal of spirits. This was in order to take control of their shipments, so far as to keep accurate account of everything going into or coming out of their warehouse, but shipments were not interfered with except to that extent. Two days ago, however, I notified Messrs. Cumming & Co. that I should seize on the street any spirits of theirs going out of their store. This action is fully warranted by the facts in the case, and rests on grounds not affected by the recent decision of the Hon. Commissioner in respect to spirits in bond.

Among the irregularities is a deficiency in the bonded account
18 amounting to several hundred barrels, a detailed statement of which has been made up and will be submitted early in the coming week. It is not desirable that the evidence should be spread out, but early in the week decisive action will be taken.

Resp. and truly,

J. F. BAILEY,
Coll'r Int. Rev. 4th Dist., N. Y.

Hon. E. A. ROLLINS,
Com. Int. Rev.

On the 25th November, 1867, Collector Bailey sent the following letter to Collector Shook:

[61 Chambers street, office of collector of internal revenue, fourth district, State of New York.]

NEW YORK, 25 *November*, 1867.

MY DEAR SIR: This morning I was advised that 270 bbls., or thereabouts, of spirits was to be removed from warehouse, 60 Broad st. I will thank you to furnish me with the marks of this lot, as there are certain lots in the warehouse in regard to which there are irregularities that require investigation. On being furnished with the marks I will state to you whether it is a part of suspected lots.

I am, resp't'y,

J. F. BAILEY,
Collector.

SH. SHOOK, Esq.,
Collector 32 Dist.

On the 29th November, 1867, the following letter was sent by Collector Bailey to Collector Shook:

[61 Chambers street, office of collector of internal revenue, fourth district, State of New York.]

NEW YORK, 29 *November*, 1867.

SIR: In consultation with Deputy Harland, on Wednesday, he advised the closing of the warehouse of Cumming & Co., 60 Broad st., and the making no more removals. Under these circumstances I have to ask that you will give no further permits for removals until the Hon. Commission shall have taken action in the premises.

I am, respectfully and truly,

J. F. BAILEY,
Collector.

SHERIDAN SHOOK, Esq.,
Collector 32 Dist.

On the 2d December, 1867, Collector Shook ordered Inspector Appel to make an examination of the bonded warehouse by the following letter:

[United States internal-revenue collector's office, 32d district, New York.]

NEW YORK CITY, *Dec.* 2, 1867.

MY DEAR SIR: In accordance with an understanding had between Mr. Dep'y Commissioner Harland and myself, at a recent interview, I have to request that you will proceed to the bonded warehouse at Nos. 58 and 60 Broad st., and make a thorough examination of the storekeeper account, of the number and contents of the packages, and of the general conduct of the affairs of the said warehouse.

Very respectfully,

SHERIDAN SHOOK,
Collector.

Major APPEL.

On the 2d December, 1866, Messrs. Appel, Palmer, and Johnson, revenue officers, made an examination of the bonded warehouse, and on the 7th December, 1867, General Inspector Stevens, who had assisted in the examination, made the following report to Appel:

NEW YORK, *December* 7, 1867.

Major APPEL:

SIR: In obedience to your instructions I have made an inspection of the entire lots of high wines, alcohol, cologne spirits, and old whisky, 19 stored in the bonded warehouse of Cumming & Co., No. 58 and 60 Broad st., N. Y.; I found all goods to agree with the marks on the packages.

I inspected each of the several lots separately; some of the whiskies were very old and choice. One lot of 315 barrels, said to be taken out "for change of package" and returned, I found to be an old whisky of fine grade.

In my inspection of the whole stock I found nothing irregular or contrary to the general condition of all warehouses I have ever seen.

FRED. A. STEVENS,
U. S. Gen'l Inspector, 43 New st.

On the 7th December, 1867, the following letter was sent by Collector Shook to Appel:

[United States internal-revenue collector's office, 32d district, New York.]

NEW YORK, *December 7th*, 1867.

MY DEAR SIR: In reply to yours of this date requesting me to state officially the reason why free whiskey was found on the premises of Mess. J. M. Cumming & Co., Nos. 58 and 60 Broad st., the same being now occupied as a bonded warehouse, I have to say that prior to Oct'r 1st the bonded premises at the above place consisted of the two upper floors of No. 58 and three upper floors of No. 60. The two lower floors and cellar of No. 58 and the lower floor and cellar of No. 60 were free premises, in which was permitted, under the regulations then in force, the storage of

free goods. When the new regulations went into force, about the 1st of October, Mess. Cumming & Co. made application to and did bond the entire premises.

They had at this time in the cellars of these buildings a quantity of free whiskey, which I was assured was very valuable, and which had been there a long time. Application was made to me to allow it to remain there until Mess. Cumming & Co. could hire a place where it could be stored under their own supervision, and in consideration of the value of the whiskey, and of the probable loss to Mess. Cumming & Co. if they were forced to store it where they could have no control over it, I gave the requisite permission.

The day Mr. Bailey and officers first visited the place Cumming & Co. notified me that they had procured a cellar for the storage of the whiskey, and directions were given to have it moved.

Very respectfully,

SHERIDAN SHOOK,
Collector.

CHAS. A. APPEL, Esq.

On the 10th December, 1867, the following letter was sent by Commissioner Bailey to Commissioner Shook:

NEW YORK, *December* 10, 1867.

SIR: Will you please to give to storekeeper, 60 Broad street, the directions to give to Inspector Koop the use of bonded-warehouse book today.

J. F. BAILEY,
Collector.

To SHERIDAN SHOOK,
Collector Thirty-second District.

On the 11th December, 1867, the Commissioner of Internal Revenue sent the following letter to Deputy Commissioner Parnell, in New York:

TREASURY DEPARTMENT,
OFFICE OF INTERNAL REVENUE,
Washington, December 11th, 1867.

SIR: I enclose herewith the report of Major Appel and sundry accompanying papers concerning the bonded warehouse at Nos. 58 and 60 Broad street, New York.

The papers do not seem to show any reason for interruption of the ordinary transactions of business, and I therefore forward them to you in order that you may have conference with both the collectors, Bailey and Shook, upon the subject-matter, and give such direction, from your examination of the case, as you believe correct.

Very respectfully,

E. A. ROLLINS,
Commissioner.

Hon. GEO. PARNELL,
Deputy Commissioner, New York.

On the 12th December, 1887, the following letter was sent by Commissioner Bailey to Commissioner Shook :

NEW YORK, *December* 12, 1867.

SIR: Will you please to allow Inspector Koop access to bonded book of warehouse, 60 Broad street,

And oblige, yours, respectfully and truly,

J. F. BAILEY,
Collector.

TO SHERIDAN SHOOK, Esq.,
Collector Thirty-second District.

No official correspondence relating to the claimants' warehouse appears subsequent to the foregoing.

IV.

During the period of the official correspondence set forth in the preceding finding, and subsequently thereto, the following events took place: On the 7th November, 1867, the officers named in the communication of that date from Collector Bailey to Collector Shook, with another named Koop, went to the bonded warehouse, 58 and 60 Broad street, and stated to the official storekeeper in charge that they were authorized by Collector Bailey "to seize the warehouse to make an examination." The storekeeper demanded to know whether they held an order from Collector Shook, and, in the absence of such an order, refused to admit them to the warehouse. The storekeeper then went and reported the facts in person to Collector Shook, who ordered that the inspecting officers be allowed to go in and make the examination. It continued for several days, and the warehouse was kept under surveillance, but no interference with the business of Cumming & Co. occurred, other than such as was incidental to an examination of their books, and of the stock in the store, until the 15th November, 1867, when Collector Bailey ordered the keeper in charge not to allow the removal of spirits, and on the 21st notified Cumming & Co. that he should seize on the street any spirits of theirs going out of the store.

On the 22d November, 1867, Deputy Collector William H. Barrows, one of the inspecting officers above referred to, made a report to Collector Bailey, setting forth the alleged irregularities in the bonded warehouse, 58 and 60 Broad street, which are referred to in the report of Collector Bailey to the Commissioner of Internal Revenue, November 23d, 1867, set forth in the preceding finding. In consequence of these two reports, the Commissioner of Internal Revenue appointed a committee to examine the bonded warehouse, consisting of Charles A. Appel, a clerk in the Internal Revenue Bureau in Washington, of Albert Palmer, the deputy of Collector Shook, and of William Johnston, an inspector attached to the Metropolitan Board in New York. This committee made two examinations of the bonded warehouse, and twice reported that no cause for seizure existed. The second report was in writing, bearing date the 7th December, 1867. It was received at the Internal Revenue Bureau shortly after its date, but cannot be found. It agreed in substance with the report of General Inspector Stevens, of the same date, set forth in the preceding finding.

Subsequently to the report of the committee above referred to, the Commissioner of Internal Revenue determined by his letter of December 11, 1867 (Finding III), that no cause existed for the seizure of
21 Cumming & Co.'s goods, and that no irregularities had existed which required the closing of the bonded warehouse; after which interference with their business ceased. But the business books of Cumming & Co., which had been forcibly taken from them by Collector Bailey against their protest, were not returned to them, though it does not appear that they demanded or made any attempt to procure them after the investigation had ceased.

V.

On the 27th December, 1867, certain bonded and business warehouses in Cincinnati, belonging to the firm of Boyle, Miller & Co., together with their contents, were destroyed by fire. In June, 1869, Hamilton J. Miller, a member of the two firms of Boyle, Miller & Co., and Joseph M. Cumming & Co., and William McRoberts, likewise a member of both firms, made and, for the purpose of procuring a refund of taxes on the spirits destroyed in said fire, presented to the Treasury Department the following affidavits:

STATE OF OHIO, *Hamilton Co., ss:*

Hamilton J. Miller, of lawful age, makes oath and says that he is one of the firm of Boyle, Miller & Co., which said firm was composed of this affiant and Wm. McRoberts, and he was also proprietor of bonded warehouses Nos. 18 and 26 in the first district of Ohio.

Affiant further says that said warehouses were at Nos. 55, 57, and 59 East Columbia street, in the city of Cincinnati, and were, together with the distillery and business warehouse of Boyle, Miller & Co., entirely destroyed by fire on 27th day of December, 1867, at about 6 o'clock p. m. of said day.

Affiant further says that all the spirits contained in said bonded warehouses were the property of Boyle, Miller & Co., some 75 barrels; that the same is correctly stated in the schedule hereto attached; that every gallon therein set forth was actually in said warehouses when they were destroyed and were consumed by said fire.

Affiant further says that a large portion of said whisky was the same that was in said warehouses when the same were examined by Messrs. Fosdick, Hunter & Johnson in the preceding July.

Affiant further says that the spirits, amounting to 3,294 barrels, which had been withdrawn from said warehouses on redistillation bonds, were actually at the time of said fire in the business warehouses of Boyle, Miller & Co. and in their distillery, and were, together with said warehouses and distillery, totally consumed by said fire.

Affiant says that he has carefully prepared a schedule showing the amount of stock, machinery, fixtures, and merchandize of Boyle, Miller & Co., destroyed by said fire, contained in the bonded warehouses of affiant and in distillery and business warehouses of Boyle, Miller & Co., also a statement of the insurance thereon and a schedule showing the actual loss of Boyle, Miller & Co. by said fire, all of which are hereto attached.

Affiant says that the actual loss of Boyle, Miller & Co. from said fire,

without calculating the loss by being compelled to suspend business almost wholly whilst their establishment was being rebuilt, amounted to the sum of $293,119.84.

Affiant further says that by reason of the immense losses sustained by said fire, and from no other cause whatsoever, the firm of Boyle, Miller & Co. have become financially embarrassed and obliged to suspend payment.

Affiant further says that the business of Boyle, Miller & Co. was carried on in perfect good faith with the Government; that the schedules hereto attached show that from August, 1865, to Dec'r, 1867, they paid taxes at Cincinnati, Ohio, $1,128,883.96, and by their agents at other points, $1,179,850.32, making a grand total of two million three hundred and eight thousand seven hundred and thirty-four and $\frac{28}{100}$ dolls., handling in that time one hundred and five thousand one hundred and twenty-four barrels of whisky, representing 5,630,406 galls.

HAMILTON J. MILLER.

Sworn to before me and signed in my presence this 4th of June, 1869.

REUBEN TYLER, [L. S.]
Notary Public.

22 STATE OF OHIO, *Ham. County, ss:*

William McRoberts, of lawful age, makes oath and says that he is one of the firm of Boyle, Miller & Co.; that he has read the affidavit of Hamilton J. Miller, and that the matters and things therein stated are true, and this affiant states of his own knowledge.

WILLIAM MCROBERTS.

Sworn to before me and signed in my presence this 4th of June, 1869.

REUBEN TYLER,
Notary Public, Ham. Co., O.

And the court finds that by reason of the losses so sustained in consequence of said fire, and from no other cause whatsoever, the firm of Boyle, Miller & Co. became financially embarrassed and obliged to suspend payment.

And the court further finds that in December, 1867, or early in January, 1868, the firm of Cumming & Co. became financially embarrassed and was obliged to wind up its business and dispose of its stock at forced sales and at a heavy loss. But the books of the firm not being before the court, the court is unable to determine to what extent such closing of the business was caused by the suspension of Boyle, Miller & Co., and to what extent it was caused by the interference of the revenue officers as set forth in the previous findings; or whether it was due to other causes.

VI.

At no time did the Commissioner of Internal Revenue or the revenue board in New York authorize a seizure of the claimant's property, and no seizure was in fact made. But for a period extending from about the 15th November, 1867, to about the 15th December, 1867, the claimants' business was interfered with and at times interrupted by Collector Bailey and the revenue officers making examinations, as set forth in Finding III;

their books were taken from them and sent to the office of Collector Bailey, so that they were unable to make collections and properly carry on their business; the removal of goods was prohibited, as set forth in Finding IV, and the seizure of goods upon the street threatened; they were unable to supply customers, and consequently lost the custom and good will of some of those with whom they dealt, and the stock of goods in their possession depreciated in value by reason of a falling market and leakage. The firm also lost credit and commercial standing in consequence of interrupted business, and of the apprehension that their stock might be, or was to be, seized for frauds upon the revenue.

VII.

At the time when Collector Bailey forbade the removal of goods from the claimants' warehouse, as set forth in Finding IV, there were stored and owned by them in bond 4,476 barrels of whisky and distilled spirits, and 347 barrels of what were known as free goods. In consequence of the detention of these spirits and goods, as set forth in Findings III, IV, and VI, and the interruption of their business, and the seizure of their books by Joshua F. Bailey, collector of internal revenue for the fourth internal revenue district of the State of New York, and other internal revenue officers acting under or with him, the firm of Joseph M. Cumming & Co. suffered damages in the amount of ($36,000) thirty-six thousand dollars.

23 VIII.

In addition to the business hereinbefore set forth the firm of Cumming & Co. did a commission business in purchasing and shipping alcohol to foreign purchasers, on which no duty was imposed and which did not go into bond. In consequence of their inability to continue their general business the firm lost this commission business from which it had derived large profits, but the court finds that the acts of Collector Bailey before set forth did not directly affect the claimants' business in alcohol, nor necessarily interfere with its continuance.

IX.

During the period in which the business of the claimants was interfered with by Collector Bailey and the revenue officers, as before set forth, the expenses of the firm of Cumming & Co., for rent, insurance, and employés continued, and amounted for that period to $5,300.

CONCLUSIONS OF LAW.

And upon the foregoing findings of fact the court decides as conclusions of law:

1. The claimants should recover the sum of thirty-six thousand dollars, the damages set forth in Finding VII.

2. The claimants are not entitled to recover the damages set forth in Findings VIII and IX.

IV.—*Opinion.*

PER CURIAM:

The court does not regard the question of statutory construction in this case as free from doubt, but, nevertheless, is of the opinion that inasmuch as the claim which is referred to the court is, upon the face of the private act, one of which the court did not have jurisdiction (as was decided by the Supreme Court in Nicholl's Case, 7 Wall., 122), the first purpose of the act was necessarily to confer jurisdiction. And the court is further of the opinion that the purpose of conferring jurisdiction must have been to enable the court to render substantial justice, if upon ordinary principles of law the parties seeking redress were entitled to it; and that the question of liability spoken of in the act is the legal liability which an ordinary body corporate, such as a railroad or municipal corporation, would be subject to for similar acts committed by their agents in similar circumstances, the provision concerning the statute of limitations probably having been inserted in the act from excess of caution.

The court is also of the opinion that the claimants' loss of business in the sale of alcohol on commission, not having been directly caused by the acts of the revenue officers, comes under the rule of remote and consequential damages, and cannot be recovered; and that the outlay of the claimants for rent, wages, and insurance was an incident of their ordinary business, and not an expense caused by or for which the Government can be held liable.

Concerning the objection raised by the defendants' counsel that
24 the firm of Cumming & Co. was guilty of irregularities under the Treasury regulations which went into operation on the 29th August, 1867, in allowing a clerk or employé to be put forward as the nominal proprietor of the bonded warehouse, and in maintaining their own place of business in the same building, and in keeping a large quantity of free goods on the premises, the court is of the opinion that as no actual fraud, concealment, or loss to the revenue is shown, and as these irregularities were much more fully known to the collector of the district and to the Commissioner of Internal Revenue than to the court, and inasmuch as the Treasury Department having knowledge of the facts had also exclusive jurisdiction of the subject-matter with power either to order a seizure or to waive an irregularity and remit a forfeiture, and having exclusive jurisdiction determined through the Commissioner of Internal Revenue that no just cause for the seizure of the claimants' property existed, the court cannot now retry the issue properly within the jurisdiction of and actually determined by the revenue department, but must regard the decision of the Commissioner as final and conclusive.

The judgment of the court is that the claimants recover of the defendants the sum of $36,000.

25 V.—*Final judgment.*

In the Court of Claims.

JOSEPH M. CUMMING AND COMPANY
vs.
THE UNITED STATES.

At a Court of Claims held in the city of Washington, on the second day of June, A. D. 1887, judgment was ordered to be entered as follows:

The court, upon due consideration of the premises, find in favor of the claimant, and do order, adjudge, and decree that the said Joseph M. Cumming and Company do have and recover of and from the United States the sum of thirty-six thousand dollars ($36,000).

26 VI.—*Defendants' appeal.*

In the Court of Claims of the United States, Dec. term, 1886.

JOSEPH M. CUMMING AND COMPANY
vs.
THE UNITED STATES. } No. 14573.

From the judgment rendered in the above-entitled cause on the 2nd day of June, 1887, in favor of claimant, the defendants, by their Attorney-General, on the 28th day of June, 1887, make application for, and give notice of, an appeal to the Supreme Court of the United States.

ROBERT A. HOWARD,
Ass't Attorney-General.

Filed and allowed June 28th, 1887, in vacation.

WILLIAM A. RICHARDSON,
Ch. Justice.

27 VII.—*Claimants' appeal.*

In the Court of Claims of the United States, term 1886–1887.

JOSEPH M. CUMMING AND HAMILTON J. MILLER, as surviving members of the late firm of J. M. Cumming & Co.,
vs.
THE UNITED STATES. } No. 14573.

From so much of the judgment as assesses the damages herein at the sum of $36,000, because the evidence shows that the actual damage sustained by claimants was at least the sum of $500,000, and for which sum judgment should have been rendered by the court herein. The judgment for $36,000, rendered in the above-entitled cause on the second day of June, 1887, in favor of claimants, by their attorney, Michael Jacobs, on the 24 day of August, 1887, is therefore inadequate in amount, and the

petitioners make application for, and give notice of, an appeal to the Supreme Court of the United States on the ground of such inadequacy of damages aforesaid.

MICHAEL JACOBS,
Claimants' Attorney, 335 Broadway, New York City, New York.

Filed and allowed Aug. 25, 1887, in vacation.

WILLIAM A. RICHARDSON,
Chief Justice.

28 In the Court of Claims.

JOSEPH M. CUMMING & COMPANY
vs.
THE UNITED STATES. } No. 14573.

I, Archibald Hopkins, chief clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court, and the conclusion of law thereon, of the opinion of the court and its final judgment, and of the applications of the defendants and the claimants for an appeal, and the allowance of the same.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this 27th day of August, 1887.

[SEAL.]

ARCHIBALD HOPKINS,
Chief Clerk Court of Claims.

(Indorsement on cover:) No. 1080. The United States, appellant, *vs.* Joseph M. Cumming and Hamilton J. Miller, surviving partners of the late firm of J. M. Cumming & Co. No. 1081. Joseph M. Cumming and Hamilton J. Miller, surviving partners of the late firm of J. M. Cumming & Co., appellants, *vs.* The United States Court of Claims. Filed September 30, 1887.

In the Supreme Court of the United States.

OCTOBER TERM, 1888.

THE UNITED STATES, APPELLANT,
vs.
JOSEPH M. CUMMING AND HAMILTON J. MILLER, surviving partners of the late firm of J. M. Cumming & Co. — No. 1080.

JOSEPH M. CUMMING AND HAMILTON J. MILLER, surviving partners of the late firm of J. M. Cumming & Co., appellants,
vs.
THE UNITED STATES. — No. 1081.

CROSS APPEALS FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1888.

THE UNITED STATES, APPELLANT,
vs.
JOSEPH M. CUMMING AND HAMILTON J. MILLER, surviving partners of the late firm of J. M. Cumming & Co. — No. 1080.

JOSEPH M. CUMMING AND HAMILTON J. MILLER, surviving partners of the late firm of J. M. Cumming & Co., appellants,
vs.
THE UNITED STATES. — No. 1081.

CROSS APPEALS FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The facts set forth in the findings of the court below are printed in the record. Of these the following only are deemed material to the appeals:

On April 8, 1867, Joseph M. Cumming, one of the claimants in this suit, made an application to the Treas-

ury Department of the United States for permission to establish a general bonded warehouse under the internal-revenue acts in certain parts of a building known as No. 60 Broad street, in the city of New York. The parts of the building which he desired to bond consisted of the first, second, and third lofts or floors. These floors had a capacity for storing about 1,700 barrels of distilled spirits in all. In that application, Cumming stated that the cellar of the building mentioned was then occupied for the storage of general merchandise; that the first floor of the same building was then occupied as a store for the transaction of business in general merchandise; and that a portion of the adjoining premises, No. 58—also occupied by him—was then bonded for the general storage of distilled spirits in bond under the internal-revenue laws. He proposed in his application to connect the bonded portion of premises No. 58 with the floors of premises No. 60, for the bonding of which the application was made. (Transcript of Record, pp. 7, 8.)

The law under which this application was made reads as follows:

> *And be it further enacted*, That general bonded warehouses, for the storage of spirits or other merchandise allowed by law to be placed in bond to secure the payment of the internal revenue tax thereon, or the exportation thereof, may be established under such rules and regulations and upon the execution of such bonds as the Secretary of the Treasury may prescribe, and shall be in the immediate custody of storekeepers who shall be appointed for that purpose, whose compensation shall be paid monthly to the collector of the district by the owners or proprietors of

> such warehouse, and shall not exceed the rates which may be allowed to storekeepers of bonded warehouses established under the laws and regulations relating to customs. * * * (Act of July 13, 1866, chap. 184, sec. 28, 14 Stat., 155.)

With this application, Cumming filed a bond, with two sureties, in the penal sum of $50,000, conditioned among other obligations that he would comply in all respects with the provisions of the warehousing and internal-revenue laws and the regulations of the Treasury Department made in pursuance thereof; and that he would not store in the warehouse known as the bonded warehouse of Joseph M. Cumming, situated at No. 60 Broad street, New York City, any other goods, wares, or merchandise than those duly bonded for warehousing and designated to be deposited in such warehouse by the internal-revenue laws, and ordered to be deposited therein by the collector or by his officer in charge; and that he would not remove or suffer to be removed from said warehouse any goods, wares, or merchandise stored therein without lawful permit, and without the presence of the officer having custody thereof. (Transcript, pp. 8, 9.)

The above-mentioned premises were in that part of New York City which, during the year 1867, was within the thirty-second internal-revenue collection district of the State, and of which one Sheridan Shook was the collector during said period, including the time of the alleged seizure mentioned in the petition in this cause (Transcript p. 9, "Appointment"); and during the same period and time one Joshua F. Bailey was collector of the fourth internal-revenue district, also in New York City. (Transcript, p. 12, Finding III.)

April 15, 1867, the Secretary of the Treasury granted Cumming's application, approved the bond, and directed the Commissioner of Internal Revenue to notify Collector Shook of the establishment of the bonded warehouse at No. 60 Broad street. (Transcript, p. 9.)

August 29, 1867, the Commissioner of Internal Revenue, under the direction and approval of the Secretary of the Treasury, pursuant to law, issued certain regulations concerning internal-revenue bonded warehouses known as Regulations, Series 3, No. 9. (Transcript, pp. 10, 22; *Act June* 30, 1864, ch. 173; §§ 1, 61; 13 Stat. L., pp. 223, 245; *Act July* 13, 1866, § 28, ch. 184; 14 Stat. L., 155.)

By these regulations it appears that bonded warehouses attached to distillery premises were designated as Class A warehouses, and bonded warehouses of the kind mentioned in Cumming's application were designated as Class B warehouses. One of the objects, indeed the principal object of these regulations, was to dispense with warehouses of Class A as far as possible. (Regulations, Series 3, No. 9, p. 4.) These regulations are not specifically set forth in the Findings of Facts.

Pages 7, 8, 9, and 16 of these regulations contain the following provisions:

> No application for a bonded warehouse, Class B, will be granted unless accompanied by the collector's certificate that the number of warehouses of that class already established in the district is not sufficient, and that the establishment of such additional warehouse is absolutely necessary for the storage of bonded goods which may arrive or be produced in the district.

Nor will an application for a bonded warehouse, Class B, be granted unless the collector certifies that neither one of the applicants for the same is engaged in the production, redistillation, or rectification of distilled spirits.

The collector must also certify that the room, building, or premises offered as bonded warehouses are satisfactory in respect to location, construction, dimensions, and the means provided for securing the safe custody of the merchandise which may be stored therein, and are in every particular in accordance with law and the regulations of the Department.

The collector, having made his report, embracing the proper certificates as above directed, will mail the same to the Commissioner of Internal Revenue together with—

1. The application and diagram;
2. The insurance certificates;
3. A certified copy of the bond, on which the collector will indorse his certificate of the sufficiency of the penalty, and the responsibility of the obligors; and
4. The name of a proper person to act as storekeeper of the warehouse.

If the application for a warehouse and the nomination of the store-keeper are approved by the Department, due notice will be given to the collector, and he will in no case allow the warehouse to be used as a bonded warehouse until such notice is received by him, nor until all tax-paid or free goods are removed therefrom.

A warehouse of this class must be an entire building, and be a first-class warehouse according to the classification of fire insurance companies of the city or place, or of the board of fire underwriters, where such exist; and, when adjoining other buildings, it must be separated therefrom by a brick or stone wall,

in which no door or other opening shall be permitted. No goods whatever shall be stored in the bonded premises except such as are allowed to be stored therein under the internal-revenue laws and regulations.

No general bonded warehouse Class B for the storage of distilled spirits shall be authorized or permitted in any building, yard, or inclosure where any other business in distilled spirits is carried on, or in premises adjoining thereto, nor shall any distiller or any other person engaged in the production, redistillation, or rectification of distilled spirits be interested in such warehouse otherwise than in storing goods in the same under a warehousing bond.

In the cities of New York, Boston, Philadelphia, Baltimore, Pittsburgh, Cincinnati, Chicago, Saint Louis, Louisville, New Orleans, and San Francisco no general bonded warehouse will be authorized or permitted of less capacity than five thousand barrels, except upon special application based upon reasons which may be deemed satisfactory by the department.

WAREHOUSES OF LARGE CAPACITY TO BE PREFERRED.

It is considered to be for the interest and safety of the Government that there should be the fewest possible number of bonded warehouses, in order that they may be more easily watched and controlled, and to this end it is desirable that general bonded warehouses should be of the largest possible capacity, having reference to the extent of the storage business in the particular district.

It is also considered of the highest importance that general bonded warehouses should be owned and conducted by responsible and reliable business men, of well-known integrity and good business habits, who will engage in the general storage busi-

ness as their principal occupation, and not as merely incidental to the traffic in the articles that may be stored.

It is not the design of the law, nor the intention of the department, to establish *general* bonded warehouses merely for the accommodation of the private business of the applicants, without any intention on their part of doing a general storage business.

For the purpose of inducing responsible men to engage in the general storage business, collectors are expected to observe faithfully the spirit of the foregoing directions, and, in passing upon applications, to have regard to the character and designs of the applicants, as well as to the location, dimensions, and number of the proposed warehouses.

* * * * * * *

THESE REGULATIONS TO BE ENFORCED ON EXISTING WAREHOUSES.

The foregoing regulations shall apply to existing warehouses as well as to those which may be hereafter established. In every district where there are internal revenue bonded warehouses, each collector will require the owners to conform strictly to the foregoing regulations. New applications must be made, new bonds filed, and every other condition herein prescribed must be complied with, so that all bonded warehouses shall stand on an equal footing under these regulations. Such existing warehouses as do not conform to these regulations must be discontinued without unnecessary delay.

* * * * * * *

When these regulations were issued Cumming was carrying on the business of a warehouse of Class B in the premises 58 and 60 Broad street, as above set forth; and at the same time and for a long time prior thereto, and dur-

ing the whole year 1867, he was a member of the firm of J. M. Cumming & Co. Said firm were doing business in the unbonded parts of said premises as wholesale liquor dealers at the time said regulations were issued. They used the unbonded portions of the premises for their wholesale liquor business, and the storage of their tax-paid spirits. The bonded portions of the premises were wholly occupied by the bonded spirits of the firm. (Transcript, p. 7.) It does not appear that any goods, wares, or merchandise belonging to other persons or firms were then, or at any time previously or subsequently, stored in the premises 58 and 60 Broad street.

At this time, namely, when said regulations were issued, and until the winding up of the business (about the end of December, 1867, Transcript, p. 20), of the firm of J. M. Cumming & Co., Hamilton J. Miller, also a claimant in this suit, and one William McRoberts were members of the said firm of wholesale liquor dealers at said premises. During the same period of time the said Hamilton J. Miller and McRoberts were also partners in the firm of Boyle, Miller & Co., at Cincinnati, Ohio, and, as such partners, were engaged in the manufacture and production of distilled spirits at that place, and also at Covington, Ky., and Peoria, Ill. (Transcript, p. 7.)

In consequence of the internal-revenue regulations, series 3, No. 9 (issued August 29, 1867), *supra*, having forbidden the establishment or maintenance of warehouses of Class B, merely for the accommodation of the private business of persons or firms having no intention of doing a general storage business; or for the carrying on of warehousing business of that class by any persons or firms engaged

in the production, redistillation, or rectification of distilled spirits; or in premises, buildings, yards, or inclosures where any other business in distilled spirits was carried on, or in premises adjoining thereto; or wherein goods other than those allowed to be stored in the premises under the internal-revenue laws and regulations were kept, one Thomas Miller, a clerk or employé of the said firm of J. M. Cumming & Co., on September 12, 1867, made a regular written application solely in his own name to the proper authorities of the United States for the establishment of the entire premises Nos. 58 and 60 Broad street, above mentioned, as a bonded warehouse of Class B; in which application he set forth the dimensions of the cellars of each building and of each floor of said buildings, and other matters required by the law and regulations then in force. With this application said Thomas Miller, as principal, filed a bond, as prescribed by said regulations, with the said Hamilton J. Miller and the said Joseph M. Cumming, and one Andrew Gross as sureties, in the penal sum of $68,000, containing, among other conditions, the same obligations as those contained in the bond of Joseph M. Cumming above cited. (Transcript, pp. 10, 11, 12.)

September 28, 1867, the Secretary of the Treasury granted the application of the said Miller, approved the bond, and directed the Commissioner of Internal Revenue to notify the collector of the thirty-second internal-revenue district of New York (Sheridan Shook) of this action (Transcript, p. 12).

From September 28, 1867, and continuously thereafter until the firm of J. M. Cumming & Co. wound up their affairs, about the end of December, 1867, as above men-

tioned, the entire premises Nos. 58 and 60 Broad street, in New York City, were known—according to said regulations, and Miller's application, and his appointment by the Secretary of the Treasury—as the bonded warehouse, Class B, of the said Thomas Miller. During this period the said Thomas Miller did not in fact own the said warehouse, nor had he any right of property or possession or interest therein. On the contrary the firm of J. M. Cumming & Co. continued during said period to occupy said premises 58 and 60 Broad street, for their own business exclusively, including their wholesale liquor business, and the storing of their own distilled spirits in bond; and during the whole of this period and contrary to said regulations they kept on the said premises a large quantity of free (tax-paid) spirits. They were the only persons who had the actual occupancy of said premises, and they only were the lessees of the premises, and as such they paid the rent therefor. During the same period the said Thomas Miller continued to be in the employment of the said firm of J. M. Cumming & Co. in his former capacity, and at the same time he was also in the employment of the said Boyle, Miller & Co. (Transcript, p. 10; p. 3 Par. XI).

Section nineteen of the act of March 2, 1867, chapter 169 (14 Stats., 482), contains the following provision:

> Any officer of internal revenue may be specially authorized by the commissioner of internal revenue to seize any property which may by law be subject to seizure, and for that purpose such officer shall have all the power conferred by law upon collectors of internal revenue, and such special authority shall be limited in respect of time, place, and kind or class of property as the said commissioner may specify.

On November 7, 1867, certain revenue officers duly authorized under the foregoing provision of law, and acting under the directions of the said collector of the fourth internal-revenue collection district of New York, and by permission of the collector of the said thirty-second district, entered upon and began an examination of the bonded warehouse, Class B, premises 58 and 70 Broad street aforesaid. (Transcript, p. 12, *et seq.* Finding III.) This examination continued until the 15th day of the same month, during which time the warehouse was kept under surveillance. (Transcript, p. 18, Finding IV.)

Although the facts of the case show that the wholesale liquor firm of J. M. Cumming & Co. had been carrying on their business as wholesale liquor dealers in said bonded warehouse during the whole period of time that the premises were bonded in the name of said Thomas Miller, there was no interference by the revenue officers with the business of said firm, except such as was incident to an examination of their books and of their stock, in the bonded premises, or elsewhere, until the said 15th of November. (Transcript, p. 20, Finding VI.) Then the collector of the said fourth internal-revenue district ordered the storekeeper in charge of the said bonded warehouse not to allow the removal of spirits therefrom. On the 21st of the same month the said collector gave notice to J. M. Cumming & Co. that he would seize on the streets any spirits of theirs going out of the store. (Transcript, p. 18, Finding IV.) At no time did the Commissioner of Internal Revenue, or the revenue board in New York, authorize a seizure of the claimants' property, and no seizure was in fact made. (Transcript, p. 20, Finding VI.)

At the time the said collector gave the said notice the said firm of J. M. Cumming & Co. owned and had stored in bond in said bonded warehouse 4,476 barrels of distilled spirits upon which the internal-revenue tax had not been paid, and also 347 barrels of free whisky on which the internal-revenue tax had been paid; which whisky was known as free goods, and, as such, was forbidden by law and by the above-mentioned regulations to be stored in a bonded warehouse of any class. (Transcript, p. 21; Finding VII.)

The above-mentioned violation of the law, and of the regulation series 3, No. 9, was duly reported to the Commissioner of Internal Revenue by the said collector of the fourth district. There was a conflict of opinion between the collector of the fourth district and the collector of the thirty-second district as to whether the violations, and other irregularities referred to in the correspondence on pages 14 to 17 inclusive of the transcript, but not specifically set forth in the findings of the court below, were sufficient cause for the surveillance and interruption of the business of said firm of J. M. Cumming & Co. at the said bonded warehouse. The collector of the fourth district held that "irregularities of the grossest character have [had] been proven," and that his action was "fully warranted by the facts in the case." (Transcript p. 14, Collector Bailey's letter of November 23, 1867.)

Collector Shook, of the thirty-second district, took the opposite view. After the making of said report by Collector Bailey he caused an examination of the said warehouse to be made, to wit, on December 2, 1867, by four other revenue officers, and on the 7th of the same month

one of these officers reported—presumably with the concurrence of the others—that he had found nothing irregular or contrary to the general condition of all warehouses that he had ever seen. (Transcript, p. 16.)

Collector Shook was specially charged with the supervision of the warehouse, it being in his own district, and he adopted the views of said latter report. (Shook's letter of Dec. 7, 1867, Transcript, p. 16.) He totally ignored the regulations, *supra*, that the collector "will in no case allow the warehouse to be used as a bonded warehouse * * * until all tax paid or free goods are removed therefrom;" and also the fact that the warehouse had been bonded under his own direct approval, in the name of Thomas Miller, less than three months before the examinations above referred to. (Transcript, p. 11.)

He regarded the warehouse bonded in said Miller's name as the bonded warehouse of Messrs. Cumming & Co., as will fully appear in his letter set forth on pages 16 and 17 of the transcript. He therein stated that when the new regulations (Series 3, No. 9), went into force (about the 1st of October,) Messrs. Cumming & Co. made application and did bond the entire premises (a statement wholly untrue), and that they had at that time a quantity of free whisky which had been there a long time, which whisky he, for reasons therein stated, permitted to remain in said bonded warehouse. He further stated that on the day the collector of the fourth district and his officers first visited the place, Cumming & Co. notified him (the collector of the thirty-second district) that they had procured a cellar for the storage of that whisky and that directions were given (by him—Shook) to have it moved. (Transcript, pp. 16, 17.)

On December 11, 1867, the Commissioner of Internal Revenue settled the conflict between the two collectors and their subordinates. (Transcript, p. 17.)

In a letter of that date, addressed to one of the deputy commissioners of internal revenue, who was then in New York City, the Commissioner said:

> I inclose herewith the report of Major Appel and sundry accompanying papers concerning the bonded warehouse at Nos. 58 and 60 Broad street, New York.
>
> The papers do not show any reason for interruption of the ordinary transactions of business, and I therefore forward them to you in order that you may have conference with both the collectors, Bailey and Shook, upon the subject matter, and give such direction from your examination of the case as you believe correct. (Transcript, p. 17.)

After the writing of this letter there was no interference by the officers of the United States or by any persons acting under their authority, with the property or business of the said J. M. Cumming & Co. (Transcript, p. 19; Finding IV, par. 4.)

No seizure had in fact been made at any time by the internal-revenue officers or by any person acting under authority of the United States of any of the distilled spirits or whisky of the said J. M. Cumming & Co. in said bonded warehouse or elsewhere. (Transcript, p. 20, Finding VI.)

But for a period extending from about the 15th November, 1867, to about the 15th December, 1867, the business of the said firm was interfered with and at times interrupted by Collector Bailey and the revenue officers

making examinations, as set forth in Finding III of the court below; their books were taken from them and sent to the office of Collector Bailey, so that they were unable to make collections and properly carry on their business; the removal of goods was prohibited, as set forth in Finding IV of the court below, and the seizure of goods upon the street threatened; they were unable to supply customers, and consequently lost the custom and good will of some of those with whom they dealt, and the stock of goods in their possession depreciated in value by reason of a falling market and leakage. The firm also lost credit and commercial standing in consequence of interrupted business, and of the apprehension that their stock might be, or was to be, seized for frauds upon the revenue. (Transcript, p. 20, Finding VI.)

For the period in which the business of the said firm of J. M. Cumming & Co. was interfered with by Collector Bailey and the other revenue officers, to wit, at various times between November 15, 1867, and December 15, 1867, as before set forth, the court below found that the expenses of the said firm for rent, insurance, and employés continued, and that said expenses amounted for that period to $5,300. (Transcript, p. 21, Finding IX.)

Subsequently the claimants applied to Congress for relief, and on February 25, 1885, obtained the passage of the following act:

[Private No. 113.]

AN ACT for the relief of Joseph M. Cumming, Hamilton J. Miller, and William McRoberts.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That Joseph M. Cumming, Hamilton J.

> Miller, and William McRoberts, late copartners in the business of commission merchants and bonded warehousemen in the city of New York, be permitted to sue in the Court of Claims; which court shall pass upon the law and facts as to the liability of the United States for the acts of its officer, Joshua F. Bailey, by reason of the seizure, detention, and closing up of the commission houses and bonded warehouses of said copartners, for the breaking up and interruption of their said business, and for the seizure and detention of the property, books, and papers in and connected with said business, by Johusa F. Bailey, collector of internal revenue for the fourth internal-revenue district of said State or by said Bailey and other internal-revenue officers. The United States shall appear to defend against said suit, and either party may appeal to the Supreme Court as in ordinary cases against the United States in said court; and said suit may be maintained, any statute of limitation to the contrary notwithstanding (23 Stat.,639).

The claimants brought suit in the Court of Claims under this act; and upon the foregoing facts—as more fully set forth in the findings printed in the record in this cause—that court decided as conclusions of law, as follows:

> 1. The claimants should recover the sum of thirty-six thousand dollars, the damages set forth in Finding VII.
>
> 2. The claimants are not entitled to recover the damages set forth in Findings VIII and IX.

And the judgment of the court was that the claimants recover of the defendant the sum of $36,000.

From this judgment both parties have taken an appeal to this court.

ASSIGNMENT OF ERRORS.

I.

The court had not jurisdiction to give judgment on the facts in this case.

II.

The court erred in rendering judgment for the claimants.

THE APPEAL OF THE UNITED STATES.

BRIEF OF ARGUMENT.

There are two points in this cause to which the attention of the court is asked by the United States:

1. *Upon the facts stated in the findings of the Court of Claims, the special act conferred no jurisdiction upon that court to proceed to judgment against the United States.*

2. *If the court had jurisdiction the conclusion that claimants were entitled to recover is not warranted by the facts set forth in the findings.*

These propositions are the answer to the mandate of the statute.

I.

THE INTERPRETATION OF THE ACT.

(1) It is clear that without the private statute these claimants could not have had this action. Their petition states that Bailey, a collector of internal revenue, seized

their property wrongfully and without cause, and that said seizure was carried out and consummated solely by virtue of the authority of the United States delegated to the said Bailey. But the powers and duties of officers of the Government are limited and defined by law. There is a broad distinction between liabilities created by the acts of public and private agents. The former can only bind the Government where they have actual authority (*The Floyd acceptances*, 7 Wall., 666).

By the allegations of their petition and by the proofs, if Cumming & Co. sustained any loss and injury, that loss and injury occurred from the tortious acts of Bailey. If wrong was done to these complainants, redress might have been had from Bailey. No relief could be obtained from the United States in the courts. It is fundamental that a government can not be sued without its consent, and then only in the manner and to the extent permitted. This permission must be by statutes; and these statutes, being in derogation of common law and relinquishing sovereign rights, must be strictly construed.

In *Beers* v. *Arkansas* (20 How., 527), Mr. Chief-Justice Taney says:

> It is an established principle of jurisprudence in all civilized nations that the sovereign can not be sued in its own courts, or in any other without its consent and permission; but it may, if it thinks proper, waive this privilege and permit itself to be made a defendant in a suit by individuals, or by another State; and as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in

> which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it.

In *United States* v. *Clarke* (8 Pet., 436, 444), Mr. Chief-ustice Marshall said:

> As the United States was not suable of common right, the party who institutes such suit must bring his case within the authority of some act of Congress, or the court can not exercise jurisdiction over it.

In *Carey* v. *Curtis* (3 How., 236, 245), Mr. Justice Daniel said:

> The Government, as a general rule, claims an exemption from being sued in its own courts. * * * It will not permit itself to be impleaded therein, save in instances forming conceded and express exceptions.

(2) The special act we are considering gave Cumming & Co. this right to sue in the Court of Claims. Does their case come within the authority of the act? It is to be observed throughout this discussion that there is no pretense that anything was done or received by Bailey which could create an implied promise upon the part of the Government for compensation. Bailey's acts, if not justifiable, were trespasses. He could have been held to make redress.

But these acts were not of such a character as to make the United States responsible.

In *Gibbons* v. *United States* (8 Wall., 269, 274), Mr. Justice Miller, delivering the opinion of the court, said:

> No government has ever held itself liable to individuals for the misfeasance, laches, or unauthorized exercise of power by its officers and agents.

In the language of Judge Story, "it does not undertake to guaranty to any person the fidelity of any of the officers or agents whom it employs, since that would involve it in all its operations in endless embarrassments, and difficulties, and losses, which would be subversive of the public interests."

The creation by act of Congress of a court in which the United States may be sued, presents a novel feature in our jurisprudence, though the act limits such suits to claims founded on contracts, express or implied, with certain unimportant exceptions.

But in the exercise of this unaccustomed jurisdiction the courts are embarrassed by the necessary absence of precedent and settled principles by which the liability of the Government may be determined. In a few adjudged cases where the United States was plaintiff, the defendants have been permitted to assert demands of various kinds by way of set-off, and these cases may afford useful guidance where they are in point. The cases of *United States* v. *Kirkpatrick* and *Dox* v. *The Postmaster-General*, are of this class, and establish the principle that even in regard to matters connected with the cause of action relied on by the United States, the Government is not responsible for the laches, however gross, of its officers.

The language of the statutes which confer jurisdiction upon the Court of Claims, excludes by the strongest implication demands against the Government, founded on torts. The general principle which we have already stated as applicable to all governments, forbids, on a policy imposed by necessity, that they should hold themselves liable for unauthorized wrongs inflicted by their officers on the citizen, though occurring while engaged in the discharge of official duties.

The principle is clearly stated in Story on Agency, section 307 a:

> In respect to the acts and declarations and representations of public agents, it would seem that the same rule does not prevail which ordinarily governs in relation to mere private agents. As to the latter (as we have seen) the principals are in many cases bound, where they have not authorized the declarations and representations to be made. But, in cases of public agents, the Government, or other public authority, is not bound, unless it manifestly appears that the agent is acting within the scope of his authority, or he is held out as having authority to do the act, or is employed in his capacity as a public agent to make the declaration or representation for the Government. Indeed, this rule seems indispensable in order to guard the public against losses and injuries arising from fraud or mistake, or rashness and indiscretion of their agents.

The actual extent of Bailey's power was to seize goods held with a fraudulent intent. For what he did beyond that the Government was under no obligation of any kind to give relief (*Whiteside* v. *United States*, 93 U. S., 247).

(3) So that, while these claimants are permitted to sue the Government in the Court of Claims, and while Bailey might have been held liable in an action against him for injurious interference with the business of Cumming & Co., it still remains that the United States can not be made responsible for the tortious acts of its officer, unless it made itself so by this act. An unbroken line of authority says that "the supreme power in every State, wherever it may reside, shall not be compelled, by process of courts of its own creation, to defend itself from assaults in

those courts;" and, especially, that it shall never be called upon to answer for torts committed by its agents. If it divests itself of this necessity of sovereignty, so unusual a concession must be by words clear, plain, positive. This court has more than once sounded notes of warning where attempts have been made to impose these kinds of obligations.

In *Gibbons Case*, *supra*, this court said, by Mr. Justice Miller:

> These reflections admonish us to be cautious that we do not permit the decisions of this court to become authority for the righting, in the Court of Claims, of all wrongs done to individuals by the officers of the General Government, though they may have been committed while serving that Government, and in the belief that it was for its interest. In such case, where it is proper for the nation to furnish a remedy, Congress has wisely reserved the matter for its own determination. It certainly has not conferred it on the Court of Claims.

In *Langford's Case* (101 U. S. R., 345) the same judge, delivering the opinion of the court, said:

> The jurisdiction of that court has received frequent additions by the reference of cases to it under special statutes, and by other changes in the general law; but the principle originally adopted, of limiting its general jurisdiction to cases of contract, remains. There can be no reasonable doubt that this limitation to cases of contract, express or implied, was established in reference to the distinction between actions arising out of contracts, as distinguished from those founded on torts, which is inherent in the essential nature of judicial remedies under all systems, and especially under the system of the common law.

> The reason for this restriction is very obvious on a moment's reflection. While Congress might be willing to subject the Government to the judicial enforcement of valid contracts, which could only be valid as against the United States when made by some officer of the Government acting under lawful authority, with power vested in him to make such contracts, or to do acts which implied them, the very essence of a tort is that it is an unlawful act, done in violation of the legal rights of some one. For such acts, however high the position of the officer or agent of the Government who did or commanded them, Congress did not intend to subject the Government to the results of a suit in that court. This policy is founded in wisdom, and is clearly expressed in the act defining the jurisdiction of the court; and it would ill become us to fritter away the distinction between actions *ex delicto* and actions *ex contractu*, which is well understood in our system of jurisprudence, and thereby subject the Government to payment of damages for all the wrongs committed by its officers or agents under a mistaken zeal, or actuated by less worthy motives.

(4) This is an act for the relief of individuals. It is not properly a remedial statute, as it has been called: and is not to be entirely construed by the rules of construction of remedial statutes. Its recitals are not to be taken as statements of facts in the sense that they create liability. It is a private statute permitting individuals to show, if they can, a right to redress from the Government, existing at the time of the commission of the acts complained of. This act bears internal evidences that it is different from the original draft. It was evidently changed and amended before it was thrown, full-fledged, into the Court of Claims.

It is a reasonable presumption that orginally it was intended to provide for referring the claim and complaint to the court for findings of fact to be transmitted to Congress, as claims are referred under the act of March 3, 1883, usually known as the Bowman Act. This is shown by the language—*pass upon the law and facts*—by the omission of any words authorizing a judgment, and by removal of any bar of limitation. (I do not wish to be understood as arguing there is no power given to render judgment. I think it ample.)

In extending the jurisdiction of the Court of Claims, Congress has passed many statutes of general and special character; but I know of none like this, if the construction contended for by claimant is to obtain. Jurisdiction has been conferred, beyond the limited jurisdiction in matters *ex contractu:* as by the Captured and Abandoned Property Act; Claims against the District of Columbia; City of Carondelet disputes; the Hot Springs Reservation; the French Spoliation Act; and others. In several instances a special jurisdiction has been conferred in cases of collisions at sea between private vessels and vessels of the Navy of the United States: but the cases have been put rather upon an implied promise to pay for property; and there have been cases for the relief of individuals, some of which we will proceed to examine. In all of these the statutes have been strictly construed, according to well-settled rules of construction.

> The general rule in exposition of all acts of Parliament, that in all doubtful matters, and where the expression is in general terms, they are to receive such a construction as may be agreeable to the rules

> of common law, in cases of that nature; for statutes are not presumed to make any alteration in the common law, further or otherwise than the act does expressly declare; therefore, in all general matters the court presumes the act did not intend to make any alteration, for if the Parliament had had that design they would have expressed it in the act. (*Arthur* v. *Bokenham*, 11 Mod., 150; *Learenworth, etc., R. R. Co.* v. *United States*, 92 U. S. R., 740; *Harvey* v. *United States*, 105 U. S. R., 680; *United States* v. *Jones, administrator*, 120 U. S. R., Oct. T., 1886.).

Most if not all the private acts sending claims to the Court of Claims are by virtue of petitions presented to Congress, similar in character. The titles of the acts state that they are for the relief of certain parties; and the claim is referred to the court to hear and determine. The case of Cumming & Co. stands upon a different basis. Their claim is not referred; but a forum is designated for them and they are permitted to "sue in the Court of Claims." If Congress had gone no further, they would have come in here precisely as any other suitor comes. They would have had no other rights, nor would any different obligations have been placed on the Government by the mere permission to sue.

Tillson v. *United States* (100 U. S. R., 43), was brought under a special statute for relief, referring a claim for loss and damage, growing out of the failure of the Government to perform contracts, to the Court of Claims, which court was "authorized and directed to investigate the same, and to ascertain, determine, and adjudge the amount

equitably due said firm, if any, for such loss and damage." This court, by Mr. Chief-Justice Waite, said;

> We have no doubt it was the wish of those who procured the passage of the special statute under which the Court of Claims took jurisdiction of this suit, to obtain from Congress authority for that court to give a judgment against the United States at least for interest, in case it should be found that payments on the contracts held by the claimants had been unreasonably delayed. But if Congress had desired to grant such authority, it would have been easy to have said so in express terms; and because it did not say so, we are led irresistibly to the conclusion that it did not intend to give any such power.
>
> By the statute, the court was required to investigate the claim and "ascertain, determine, and adjudge the amount equitably due such firm, if any, for such loss or damage." There is nowhere any intimation that the investigation is to be conducted otherwise than judicially. The reference was made to the court as a court, and not to the judges as arbitrators. The determination is to be made according to the fixed rules which govern that court in the adjudication of causes, and not at the discretion of the judges. The same principles of jurisprudence and the same statutory regulations as to practice are to be applied here that would be if the case had come into the court under its general jurisdiction.
>
> It is to be ascertained and determined what, if anything, is due the claimants from the Government, according to the rules of law applicable to the settlement in that court of controversies between the Government and its citizens. The special statute does not even provide that the adjustment shall be made upon principles applicable to suits between citizens. To our minds the word "equitably," as here used,

means no more than that the rules of law applicable to the case shall be construed liberally in favor of the claimants.

McClure v. *United States*, 116 U. S. R., 145, was a suit brought under a special statute for the relief of McClure, referring his claims for credits on differences in his accounts to the Court of Claims—

> With jurisdiction to hear and determine said claims. And if the said court shall be satisfied from the evidence that any of the moneys charged to him were not in fact received by him, or that other just and equitable grounds exist for credits claimed by him, it shall make a decree, setting forth the amount to which the said McClure shall be entitled to receive credit, upon which the proper accounting officers of the Treasury shall allow him the amount so decreed as a credit in the settlement of his accounts: *Provided*, That the testimony of said McClure shall be received in his own behalf by said court, and until the determination of said cause the final adjustment of his said accounts is suspended: *And provided further*, That an appeal shall be allowed to either party as in other cases.

In interpreting this statute Mr. Chief-Justice Waite uses the following language:

> This suit clearly comes within the principle of *Tillson's Case*. It is in the nature of a defense to an action at law brought by the United States to recover the balance claimed to be due upon the account as stated at the Treasury. The statute requires the court to hear and determine judicially, (1) whether the disputed sums charged to McClure were in fact received by him, and (2), whether any other just or equitable grounds exist for the credits claimed by

him. The statute under which the Court of Claims is organized would have been enough to give that court jurisdiction of the claims for credit on account of the moneys seized by the Confederate authorities (Rev. Stats., sec. 1059, clause 3, and sec. 1062). But under that statute McClure could not have given testimony in his own behalf. The special act relieves him from that disability and allows him to join his claims for other errors with his claims for losses by capture, etc., and thus have the whole matter determined in one suit; but, save as to his competency as a witness, and possibly an injunction to construe the rules of law liberally in his favor, the practice of the court under its general jurisdiction has not been altered.

Some stress was put in argument upon the use of the word "decree" in the statute, and it was insisted that, as this is a term technically applicable to proceedings in equity, a suit in equity must have been contemplated. To our minds this word has no special significance here. For it is provided in section 1062 of the Revised Statutes, that if, in a suit begun under clause 3 of section 1059 of the Revised Statutes, the court ascertains that the loss sued for had been without fault or negligence on the part of the officer, "it shall make a decree setting forth the amount thereof, and upon such decree the proper accounting officers of the Treasury shall allow to such officer the amount so decreed, as a credit in the settlement of his accounts;" and it is evident that the draughtsman of the present statute must have had the other before him when he was doing this part of his work, and followed it for the sake of uniformity. We have never known it to be contended that under the old law such a suit was to be looked upon as a suit in equity.

* * * * * * *

As to the proposed findings, with a view to ascertaining the existence of "just and equitable grounds for credits claimed," they are clearly immaterial for the purpose of a judicial determination of the rights of the parties. At most they would only show that McClure had been compelled to conduct his business under very unfavorable circumstances; that the amounts disbursed by him had been large; that much of his business had necessarily been done by his clerks, upon the accuracy of whose statements and calculations he was compelled in a great measure to rely; that with the exception of the present differences his accounts had always been found correct; that he had sometimes given receipts in advance of the time he had actually got the money, and by reason of the limited facilities for transacting business in his office it was possible for a receipt to be got without the money being actually paid over; that there had been great delay in advising him of the errors in his accounts, and things of a like character. These are facts proper for the consideration of Congress on an application by McClure for legislative action in his favor, but, under the most liberal construction of the rules which govern courts of justice in determining the rights of parties, they fall far short of what is necessary for affording him judicial relief.

Erwin v. *United States* (13 C. Cls., p. 49, and 97 U. S. R., 392), was a case brought under a private statute for the relief of Robert Erwin. Erwin claimed cotton under the provisions of the Captured and Abandoned Property Act. It was shown that while he was the owner of this cotton, the firm of which he was a member were adjudged bankrupt, and that the claim went into the schedules of his private property. It was enacted "That the Court of Claims

may take jurisdiction, * * * of the claims of Robert Erwin, of Savannah, Georgia, for property alleged to have been taken from him; which claims were, by accident or mistake of his agent or attorney, and without fault or neglect on his part, as is claimed, not filed within the time limited by said act" (the Captured and Abandoned Property Act).

It was strenuously insisted that this act was passed for the sole relief of Erwin, and to enable him to prove his ownership and the amount of the proceeds; that otherwise it was an empty form; that Congress had before it all the circumstances of the bankruptcy; that it was a special re-enactment for his benefit, and an enabling act to permit him to redeem his property from the effect of a forfeiture and the bar created by the limitation on actions provided by law. Both the Court of Claims and this court decided that this act did not enlarge the rights of the claimant. Mr. Justice Field, delivering the opinion here, says:

> The purpose of the statute passed for the relief of the appellant, as is manifest on its face, was to remove the bar of the Captured and Abandoned Property Act, which had arisen without his fault, or rather to confer jurisdiction upon the Court of Claims over his case, which otherwise would not have existed. It was not intended to enlarge or affect his title to the claim or to change his position in court from what it would have been had he instituted his suit within the two years prescribed by that act. His claim must therefore be considered like the claims of other suitors, both with respect to its original validity as a

demand against the Government and with respect to his title. If the proof fail in either of these particulars, no recovery can be had.

Thus the invariable rule of strict interpretation has been applied to these statutes. It is not what was the wish of those who procured the passage of the acts, but what Congress was willing to do by way of affording an opportunity to suitors to have their rights determined "according to the fixed rules which govern the Court of Claims in the adjudication of causes, and not at the discretion of judges."

And wherein should different rules be applied to the Cumming's act? It is no stronger in its language and grant than the McClure or Tillson or Erwin acts. It is enacted that the "court shall pass upon the law and facts as to the liability of the United States for the acts of its officer, Joshua F. Bailey, by reason of the seizure, detention, and closing up of the commission-houses and bonded warehouses of said copartners, for the breaking up and interruption of theirsaid business, and for the seizure and detention of the property, books, and papers in and connected with said business, by Joshua F. Bailey, collector of internal-revenue for the fourth internal-revenue district of said State or by said Bailey and other internal-revenue officers."

It would seem that Congress apprehended danger of assuming an extraordinary and novel responsibility on the part of the Government. Stouter words of limitation and restriction could not have been found. *The court shall pass upon the law and facts as to the liability of the United States for the acts of its officer.*

What is liability? Liable, Webster defines, to be bound or obliged in law or equity. Sweet, Law Dictionary, defines liability to be "a condition of being actually or potentially subject to an obligation." Abbott, Law Dictionary, defines liability to be "amenability or responsibility to law; the condition of one subject to a charge or duty which may be judicially enforced."

Take the broadest definition that can be given to liability—that is, responsibility to answer in law or justice—and what obligation would rest upon the United States to answer these parties for the wrongs committed by the revenue officers? But the framers of the statute did not leave any ground for conjecture. To make assurance double sure, they enacted that before liability should attach to the Government the court should determine it was a liability in law. Now, what law? Incontestably, the law which existed at the time of the passage of the act. There is no expressed design by Congress to create, or hold the Government to a new liability.

It is strenuously urged in behalf of the claimants that if the above reasoning is correct, the act of March 3, 1885, is meaningless and absurd. This certainly is incorrect. By the act four things are established: (1) The permission to sue is conferred; (2) the obligation of the court to pass upon the law of the liability of the United States is imposed; (3) the obligation of the court to pass upon the facts of the liability of the United States is imposed; (4) the bar of the limitation is mentioned and removed. The case was sent here for judicial investigation. As in Tillson's Case, the reference was made to the court as a court, and not to the judges as arbitrators, and the determina-

tion was to be made according to the fixed rules which govern in the adjudication of causes. Congress negatived the idea of stating the facts by requiring the court to investigate them.

The petition itself sets up, among other things, a state of circumstances which would, if proven, have supported a finding and judgment. If Bailey had made a seizure of these whiskies unlawfully and they had been destroyed or lost, or if they had been appropriated in any manner by the Government, there might have been a case for recovery under this act. If there had been evidence that the United States had received any benefit from the taking of these goods, although wrongfully or by mistake taken by its officers, I admit there is full authority in this statute to have supported a suit for compensation for the actual loss to the owners. This is where the cases of *Mitchell* v. *Harmony* and *Wiggins*, cited, would be precedents. All this might have been, and if it had been, to that extent the effect desired to be given the act could be given. The infirmity is in the proof. The error into which claimants have fallen is that their case is within neither the law nor the facts.

But, say the learned counsel, if all this is so, we could have sued in the Court of Claims, anyhow. Certainly. But they did not bring suit against Bailey nor the United States within a prescribed period. These occurrences were in 1867. The special act was March 3, 1885. Bailey is said to have fled the country. The United States and the Court of Claims were securely here. The time having elapsed there was necessity, and the only necessity that

can be conceived of, for the enactment that the suit may be maintained, any statute of limitations to the contrary notwithstanding. That argument was used in the McClure case (*supra*). The answer may be read in the opinion of this court.

The facts found, then, not bringing the case within a strict interpretation of the language of the act, claimants are forced to seek for a construction based upon the recitals in the act; and, following that, the proposition that the manifest object to be accomplished was relief for wrongs committed which are specifically stated in the brief. This proposition is untenable because it limits and restricts the investigation provided for, and because some of the recitals of facts are disproven by the findings. The argument leads to this extent: that whatever might have been the liability of Bailey is by this act made a liability against the United States directly. But, if that had been the intention, how easy and simple it would have been to have so said.

The contention in effect is;—there being in existence statutory provisions by which, under given conditions, the Government would repay to its officers moneys recovered against them by reason of anything done in the due performance of their official duties; and again, would pay final judgments against its officers; this act authorized a direct proceeding against the United States as occupying the exact place and being subject to all the responsibilities of Bailey. To arrive at this conclusion is a long journey. It stops nowhere short of judicial legislation.

The act of March 3, 1863 (Rev. Stat., 989), provides:

> When a recovery is had in any suit or proceeding against a collector or other officer of the revenue for any act done by him, or for the recovery of any money exacted by or paid to him and by him paid into the Treasury, in the performance of his official duty, and the court certifies that there was probable cause for the act done by the collector or other officer, or that he acted under the directions of the Secretary of the Treasury, or other proper officer of the Government, no execution shall issue against such collector or other officer, but the amount so recovered shall, upon final judgment, be provided for and paid out of the proper appropriation from the Treasury.

This act applies to customs. We shall presently see there is another provision applicable to internal-revenue officers. When Congress desired to extend this provision for assuming the contract of the judgment in cases arising under the Captured and Abandoned Property Act, it recognized its limited character by the passage of the act of July 28, 1866 (14 Stat. L., 328).

> The courts of the United States can take cognizance only of subjects assigned to them expressly or by necessary implication; *a fortiori*, they can take no cognizance of matters that by law are either denied to them or expressly referred *ad aliud examen*. (*Cary* v. *Curtis*, 3 *How.*, 236, 246.)

How can this statute be joined to the act of 1885? It did not provide for the assumption of a liability because the Government had wronged and damaged the citizen. It was for the protection of officers in the faithful and unfettered discharge of their duties as collectors of inter-

nal revenue. If, then, having done honestly what their judgment dictated, and at their peril if they erred, and parties damaged brought suit and obtained judgment, and the court said there was probable cause for the act, the Government says, I will step between the officer and the execution and save him and pay the debt. But there must be a suit, and a recovery, and a damage to the officer, and a certificate of probable cause by the court in which the judgment is obtained against the officer, before this act of grace will be put in motion (*United States* v. *Sherman*, 98 U. S., 565, 567). There is none of these here. If the Court of Claims had strength to proceed upon these lines, they have failed to find or give certificate of probable cause. The doctrine of implication grows and is patched at every point.

Nor can section 3220 Revised Statutes be fastened on to this act to aid construction. That statute is confined to an Executive Department of the Government. There is no interposition of a court, no certificate of probable cause. The Commissioner of Internal Revenue is authorized, among other things, under certain circumstances—

> To repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal taxes collected by him, with the costs and expenses of suit; also all damages and costs recovered against any assessor, assistant assessor, collector, deputy collector, or inspector in any suit brought against him by reason of anything done in the due performance of his official duty.

There are no analogies here. There is nothing to connect this executive action with the jurisdiction of a court.

Claimants have not done a single thing required by either of these statutes to place them within the compass of relief. And because the things required of them are impossible in this court, it is clear there can be no connection between these sections and the special act for the relief of Cummings & Co. We are forced back to the clear necessity for an express declaration of an intention to make this a case tried against Bailey with a judgment against the United States.

II.

THE JUDGMENT IS NOT WARRANTED BY THE FACTS.

The essential facts upon which the court below rendered their judgment are set forth in their seventh finding, which reads as follows:

> At the time when Collector Bailey forbade the removal of goods from the claimant's warehouse, as set forth in Finding IV, there were stored and owned by them in bond 4,476 barrels of whisky and distilled spirits, and 347 barrels of what were known as free goods. In consequence of the detention of these spirits and goods, as set forth in Findings III, IV, and VI, and the interruption of their business, and the seizure of their books by Joshua F. Bailey, collector of internal revenue for the fourth internal revenue district of the State of New York, and other internal revenue officers acting under or with him, the firm of Joseph M. Cumming & Co. suffered damages in the amount of ($36,000) thirty-six thousand dollars. (Transcript, p. 21, Finding VII.)

Under any construction or interpretation of the private act it was an error upon the facts of the case to render a judgment against the United States, because all the acts

complained of were lawful, and caused by the willful wrongs and neglects of the claimants. Evidently the passage of the act was obtained by the claimants upon representations that at the time of the alleged seizure and detention and closing up therein mentioned, they were lawfully engaged in carrying on the business of commission merchants and bonded warehousemen in the city of New York.

Prior to the promulgation of the bonded warehouse regulations, Series 3, No. 9, set forth in the foregoing Statement, such a business might have been, and indeed was, lawfully carried on by one of the claimants; but thereafter no bonded warehousemen could be lawfully engaged in carrying on any other business in distilled spirits than that of receiving for storage such distilled spirits only as could be placed in bond, namely, spirits upon which the internal-revenue tax had not been paid.

We can not presume that Congress intended to confer jurisdiction on the Court of Claims to award damages against the United States for interrupting an unlawful mode of business.

No question as to the legality and propriety of the regulations, Series 3, No. 9, can arise in this case. Their legality and propriety are self-evident. This court has always held that regulations of the Executive Departments made pursuant to law have the force of law. As these regulations had the force of law, no person had the right to evade them. Nor had any officer of the Government the power or right to dispense with any provision of these regulations, in favor of any person or firm, or to wink at the evasion of any of their provisions.

We do not admit any power in the Commissioner of Internal Revenue to suspend for a moment any provision of these regulations, nor even in the Secretary of the Treasury, while they were in force unrevoked; for to admit such power would imply a capacity to grant favors and dispensations to some persons which might be denied to others, and so open the way for the commission of the very frauds against which the regulations were directed.

From the facts found by the court below it appears that the bonding of the premises 58 and 60 Broad street, New York, in the name of Thomas Miller, in the manner stated, was a device on the part of the firm of J. M. Cumming & Co. to evade the Regulations, Series 3, No. 9, which disqualified them from carrying on the business of a bonded warehouse of Class B at said or any other premises.

It does not appear from the findings of fact by the court below that the fact that said Thomas Miller was a mere tool and figure-head for said firm of J. M. Cumming & Co., in their evasion of said regulations in the matter of bonding said premises, was either disclosed to or concealed from the collector of the thirty-second district of New York or the Commissioner of Internal Revenue. Nor does it appear that the Secretary of the Treasury was cognizant of the relations of said Miller with the firm of J. M. Cumming & Co. and the firm of Boyle, Miller & Co. when he approved the application of said Miller and designated the said premises as a warehouse of Class B, or at any time thereafter.

These facts are conclusive evidence of a business conducted in fraud of law and regulations. They show a willful deception practiced upon the Secretary of the Treas-

ury, who had the chief control and direction of superintending the enforcement of the internal-revenue laws and the promulgation of all regulations and instructions appropriate to that end. (Act June 30, 1864, sec. 1, chap. 173; 13 Stat. L., 223.)

Besides this general authority, the Secretary of the Treasury was specially charged by law with the duty of establishing bonded warehouses. Section 28 of the act of July 13, 1866, chapter 184 (14 Stat. L., 155), contains the following provision:

> That general bonded warehouses for the storage of spirits * * * may be established under such rules and regulations and upon the execution of such bonds as the Secretary of the Treasury may prescribe, and shall be in the immediate custody of store-keepers who shall be appointed for that purpose. * * *

It is not shown in the findings of fact that the Secretary of the Treasury was at any time informed of the deception that had been practiced upon him by the claimants; or that Collector Shook permitted free (tax paid) spirits to be kept in the warehouse, contrary to the express prohibition of the regulations.

When the action of subordinate officials or officers of the internal-revenue system is regular and consistent with law and regulations, we may fairly assume the sanction of the Secretary himself; but where the opposite is the case, his sanction can not be inferred.

It is unnecessary to dwell upon this part of the case. The facts show that if the internal-revenue officers had performed their duty the alleged warehouse of the said

Miller would have been permanently closed long before the 15th of November, 1867. If the revenue officers had performed their duty, Miller would not have been recommended for appointment to the Secretary of the Treasury as a proper person to carry on a bonded warehouse. (Regulations, Series 3, No. 9.)

If the Commissioner of Internal Revenue was advised of the facts of the case, he violated the trust reposed in him by the law in overruling the action of Collector Bailey.

Shall it be said that a judgment for damages against the United States should be sustained when it is founded on such facts as are before this court?

Per Lord Kenyon, in *Briggs* v. *Lawrence* (3 Term Reports, 467):

> A person suing in a court of law must disclose a fair transaction; it must not appear from his own showing at least that he has infringed the laws of his country.

This was said in a case in which the English revenue law had been evaded. See also the opinion of the same judge in *Clugas* v. *Pentaluna* (4 Term Reports, 467) to the like effect.

It is a familiar maxim that the law injures nobody. Collector Bailey was rightfully engaged in seeking to enforce the law which the claimants were grossly violating. Instead of exceeding his authority he rested far within it. We are aware of no statute or principle of law that would make either the Government or its agents liable in damages in such a case.

If we accept the construction placed on this act by the court below—that its object was to render substantial justice, if upon ordinary principles of law the parties seeking redress were entitled to it, we humbly submit that substantial justice would be entirely lost sight of, if the judgment in that court against the defendant should be sustained.

Why did not the claimants bring an action against collector Bailey for the alleged trespass? That would have been the proper, and in fact was the only mode of determining the liability of the United States for his acts. We have no explanation in the record of this failure of the claimants to seek early and substantial justice, instead of waiting for years to appeal to Congress.

The findings before the court are silent on this important feature of the case. The learned counsel for the claimants deem it necessary to offer an explanation in regard to it. Upon page 5 of their brief they say:

> Not long afterwards [after the acts complained of] Collector Bailey fled the country, remaining abroad for years. His absence and the absolute ruin of the firm for a long time delayed any attempt at relief.

NO SEIZURE OF CLAIMANTS' PROPERTY.

The contention of the learned counsel on the other side on this point is that the sixth finding of the court below that "at no time did the Commissioner of Internal Revenue or the revenue board in New York authorize a seizure of the claimant's property, and no seizure was in fact made" (Transcript, p. 20), is to be regarded as a gen-

eral verdict, controlled by special findings, and that the interruptions and interferences with the claimant's business by Collector Bailey, set forth in the third finding of the court, establish a seizure. It is submitted that the general finding of "no seizure" is in perfect harmony with the special findings referred to, and that the court below upon the whole case found "no seizure" as one of the ultimate facts.

The warehouse was already, with all its contents, in the custody of the proper revenue officer, the storekeeper in charge. (Regulations, series 3, No. 9; *Act of July* 13, 1866, sec. 40, 14 Stat. L., 160.) There can be no question of the right to examine the contents of the warehouse, and to keep the premises under surveillance during the examination. The interference and interruptions from this cause are construed by the learned counsel as a "seizure," and as being in the nature of a "levy in the legal sense." It is submitted that the learned counsel here attempt to substitute a conclusion of law for a fact specifically found.

In view of the judgment of the court below it does not appear that the question of seizure or no seizure can be material. The facts show that, in contemplation of law, the premises held under surveillance were not a bonded warehouse, and the claimants having had spirits therein on which taxes were due, such spirits might well have been seized.

THE GOVERNMENT DOES NOT ADOPT OR RATIFY TORTS.

The learned counsel for the claimants have presented an able argument on the doctrine of adoption and ratification of the acts of agents. It is submitted that this doctrine

can have no bearing on the case at bar; for whatever the rule of the law of tort may be in respect of private persons and corporations, no one however exalted in office or position has the power to adopt or ratify for the Government, the tortious conduct of its officers or agents. (Langford's Case, *supra*.) It would be a lowering of the dignity of our Government to assume for a moment that it could be capable of adopting or ratifying a wrong done to any one within its peace. In such case the time honored doctrine is that the king can do no wrong, in the sense of approving or adopting a wrong. The wrongdoer alone is liable for his acts; and it is impossible to state this doctrine too broadly. (The Athol, 1 W. Rob., 379–382.) The whole world has notice of this personal liability. It would be absurd to hold that a tort was ratified or adopted by a principal if he could not be made amenable to judicial process to the same extent as his agent. The indemnity provisions in the revenue laws do not place the Government in such a position, or in one any way analogous to it.

It would be out of place to encumber this brief with quotations from or citations of an array of authorities upon a principle so well established. Besides this, Collector Bailey's acts were all lawful, and no ratification or adoption of them was necessary.

If Bailey had been sued by the claimants, the lawfulness of his acts would have been a complete defense; but if they were unlawful he would be defenseless, subject to answer to the consequences of his personal acts in the alleged seizure and detention of their property, and responsible for the damages occasioned thereby. Ratification of his acts by his superior officers would be no valid defense.

Per Mr. Justice Matthews, delivering the opinion of the court *in re* Ayers:

> This principle is illustrated and enforced by the case of *United States* v. *Lee* (106 U. S. R., 196). In that case the plaintiffs had been wrongfully dispossessed of their real estate by the defendants, claiming to act under the authority of the United States. That authority could exist only as it was conferred by law, and as they were unable to show any lawful authority under the United States, it was held that there was nothing to prevent the judgment of the court against them as individuals, for their individual wrong and trespass. This feature will be found, on an examination, to characterize every case where persons have been made defendants for acts done or threatened by them as officers of the Government, either of a State or of the United States, where the objection has been interposed that the State was the real defendant, and has been overruled. The action has been sustained only in those instances where the act complained of, considered apart from the official authority alleged as its justification, and as the personal act of the individual defendant, constituted a violation of right for which the plaintiff was entitled to a remedy at law or in equity against the wrongdoer in his invidual character (123 U. S. R., 443, 501).

WAS THE MATTER IN SUIT COMPROMISED?

We freely accept the opinion of the court below, that the facts do not show that any fraud on the revenue was perpetrated by the claimants. We insist, however, that their business was being conducted in violation of the lawful regulations of the Secretary of the Treasury, and therefore in fraud of the law.

The court below find this, but considered that there

was a compromise of that matter by the Treasury Department.

The facts of the case show conclusively that the Secretary of the Treasury had no knowledge of the improper manner in which the premises of the claimants were bonded as a warehouse of Class B, or of the alleged seizure of the warehouse, or of its release from surveillance; or that free spirits were kept in the premises. If there was a compromise at all, it was made upon the acts complained of in the petition. We admit that the Commissioner of Internal Revenue had the power, under such regulations as the Secretary of the Treasury might prescribe, to compromise any case of fine, penalty, or forfeiture incurred under the internal-revenue laws. The amendment of section 179 of the act of June 30, 1864, made by the act of July 13, 1866, chapter 184 (14 Stat., pp. 145, 146), so provides.

Desiring to be perfectly fair in this matter, we freely express a doubt as to whether this power extended to a case like that at bar, for which no "fine penalty, or forfeiture," appears to have been prescribed by the statutes. What the court below regarded as a compromise looks more like, we respectfully urge, an attempt at compounding an offense against regulations prescribed by the Secretary of the Treasury, and granting a license to continue the offense. But in either view of the case, the alleged compromise operated as an estoppel upon the claimants against maintaining a suit for the recovery of damages in regard to or concerning any of the acts complained of. Their failure to sue Collector Bailey for his alleged tres-

pass must be regarded as giving strong support to this part of the opinion of the court below.

AS TO THE CLAIMANTS' APPEAL.

The court below did not err in their second conclusion of law and in denying judgment for the damages there referred to.

Whether these damages were or were not remote, the facts would not support the claimants' demands. The expenses alleged covered the whole period from November 15, 1867, to December 15, 1867; and Finding VI (Transcript, p. 20) was that during that period the business of the claimants at the warehouses was only "at times interrupted."

These times are not specifically set forth in any of the findings. Besides this objection if the court will turn to page 3 of the transcript, they will see that the court below could not have given judgment for the claimants in the sum of $5,300, or in any other sum; because, according to the claimants' allegation in their petition, the expenses of the firm for a period of six months are stated at $15,753. A pro rata of these expenses for the period from November 15, 1867, to December 15, 1867, would be $2,625.50; and as the interruption was not continuous during the latter period, the damages must have been less than $2,625.50, if the claimants are bound to a pro rata of the amount of these damages alleged in their petition.

These alleged expenses applied not only to the business of the firm at the warehouse, but also to their commission business, and in purchasing and shipping alcohol to foreign purchasers which did not go into bond (Finding, VIII, Transcript, p. 21). The findings do not show any inter-

ruption of that outside business by Collector Bailey, and we do not know the amount of the expenses incurred by the firm in that business. Such amount would certainly have to be deducted from their monthly expenses before a judgment could be rendered for the balance.

The court below properly held that these expenses were incident to the ordinary every-day business of the firm. This claim is therefore based on the theory of loss of profits; because mercantile expenses are only incurred with a view of carrying on a business from which profits may be derived. Collector Bailey did not compel the firm to incur these expenses. If the business of the firm had not been interrupted, some profits might have accrued to them because of these outlays, but the amount of such profits is merely speculative. The claim is similar to that in a case of illegal capture, in which Mr. Justice Story said:

> Independent, however, of all authority, I am satisfied that an allowance of damages upon the basis of a calculation of profits is inadmissible. The rule would be in the highest degree unfavorable to the interests of the community. The subject would be involved in utter uncertainty. * * *
>
> After all it would be a calculation on conjectures and not upon facts. Such a rule, therefore, has been rejected by courts of law in ordinary cases; and, instead of deciding upon the gains or losses of parties in particular cases, a uniform interest has been applied as the measure of damages for the detention of property. (The schooner *Lively*, 1 Gallison, 314, 325.)

Respectfully submitted.

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EVENING POST JOB PRINTING OFFICE—N. Y.

Supreme Court of the United States,

ON APPEALS FROM THE COURT OF CLAIMS.

THE UNITED STATES, Appellants,	No. 1080.
vs.	Brief for Respondents.
JOSEPH M. CUMMING ET AL., Respondents.	
	October Term, 1887.
JOSEPH M. CUMMING ET AL., Appellants,	No. 1081.
vs.	Brief for Appellants.
THE UNITED STATES, Respondent.	

THE FACTS.

This is a cross-appeal from a judgment rendered by the Court of Claims in favor of Joseph M. Cumming *et al.*, *against* The United States for $36,000, Cumming *et al.*, claiming that the judgment should be for a larger amount, and the defendant claiming that the judgment should have been in its favor.

The Court of Claims acquired jurisdiction of the action under an act, in these words:

" AN ACT for the relief of Joseph M. Cumming, Hamilton J. Miller and William McRoberts.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That Joseph M. Cumming, Hamilton J. Miller, and William McRoberts, late copartners in the business of commission merchants and bonded warehousemen in the City of New York, be permitted to sue in the Court of Claims; which Court shall pass upon the law and facts as to the liability of the United States for the acts of its officer, Joshua F. Bailey, by reason of the seizure, detention, and closing up of the commission houses and bonded warehouses of said copartners, for the breaking up and interruption of their said business, and for the seizure and detention of the property, books, and papers in and connected with said business, by Joshua F. Bailey, collector of internal revenue for the fourth internal-revenue district of said State or by said Bailey and other internal-revenue officers. The United States shall appear to defend against said suit, and either party may appeal to the Supreme Court as in ordinary cases against the United States in said Court; and said suit may be maintained, any statute of limitation to the contrary notwithstanding.

Approved, Febuary 26, 1885.

Department of State, March 5, 1885."

The facts are:

J. M. Cumming & Co., in the year 1867, and for several years previously, were liquor merchants, exporters and bonded warehousemen in the City of New York, under the Internal Revenue laws. They were, with perhaps a single exception, the largest dealers in whiskies in that city, having unusual facilities for obtaining the finest grades of these goods. H. J. Miller and William McRoberts, two of the partners, comprised the firm of Boyle, Miller & Co. of Cincinnati, distillers, rectifiers and liquor merchants, the most extensive firm in the United States in that line, having distilleries in Cincinnati, in Covington, Kentucky,

and in Peoria, Illinois. Their Peoria distilleries were for the production of high wines and alcohol, and that in Covington exclusively for Bourbon whisky. The bulk of the goods of J. M. Cumming & Co., was bought from Boyle, Miller & Co., fully 4,000 barrels of whisky a month, exclusive of alcohol; and fine old whiskies varying from five to ten years in age, and worth from $3.50 to $8 per gallon, made prior to the enactment of the tax and known as "tax paid" were in like manner purchased from them from time to time. The firm also usually had a small quantity of domestic wines on consignment to sell on commission. The amount of business done by J. M. Cumming & Co. in whiskies alone, reached between three and four million dollars a year. Besides this, their shipments of alcohol in bond for exportation were extensive. The taxes they paid to the Government were very large. Not only were their business standing and mercantile credit of the best—marked A No. 1 in Bradstreet's—but they were well known to the Internal Revenue officials, as well as to the trade, as a straight and honorable whisky house. No charge of fraud or taint of wrongdoing had been placed upon them, a rare thing in those days, when violations of the whisky laws were frequent and the moiety system was an incentive to seizures, frequently for mere irregularities.

At this time, the middle of November, 1867, seizure of their bonded warehouses was made by U. S. Collector Joshua F. Bailey, of another Internal Revenue district (the 4th of New York), under a roving commission and authority delegated to him from the Treasury. No cause was assigned to them for this act, no specific violations of the law were pointed out or reported to the Treasury, and no legal proceedings taken for forfeiture, as required by law, which would have permitted a defense to be made and a release of the goods on security given. Their books were taken to Bailey's office, and, notwithstanding repeated requests, were never returned. Not only was the whisky in bond (nearly 9,000 barrels) detained, but the free goods also (1,500 barrels of fine old whiskies), and access

even denied for the cooperage so necessary to prevent leakage. The business was interrupted for over a month, during which several hundred thousand dollars in obligations matured, and when finally a release was obtained, the necessary sacrifice sales and hypothecations, the depreciation caused by a change of the law, and the loss of trade, resulted in the complete ruin of the firm.

Knowledge of the illegality of the seizure was brought directly home to the Government.

The firm made remonstrances not only to Bailey's office and Collector Shook, but directly to the Department at Washington; and finally three trusted revenue officials were detailed to examine and report whether the seizure was justifiable. One of these officers was Major Appel, then in the Internal Revenue office of the Treasury Department at Washington, who was especially detailed for the purpose from the Department. With him, Mr. Palmer, deputy collector of the Thirty-second District, in which the bonded warehouses were situated, and Mr. Johnson an inspector attached to the Metropolitan Board in New York, were detailed by the collector under direction of the Department at Washington; and the Metropolitan Revenue Board—commissioned by the Secretary of the Treasury, consisting of Mr. Harland, then deputy commissioner of Internal Revenue, three district attorneys, and the Sub-Treasurer of the United States at New York—especially instructed Mr. Johnson, an inspector of Internal Revenue attached to the board, to assist in the examination, and ascertain whether there had been any fraud committed upon the Government in this warehouse as charged by Collector Bailey. A thorough examination, lasting over two days, was made by these three skilled officers of the revenue, who reported to the Commissioners of Internal Revenue that they found no fraud or irregularity, in the conduct of this bonded warehouse; and all three have testified to the same fact in this case, Collector Shook of the district also stating that he forwarded such report to the Department.

Major Appel told Collector Bailey the next day, that the

warehouse, was all right, and he had no business to seize it, and said the same to Deputy Collector Harland, who replied "that it was an outrage." The warehouse should have been immediately released; yet time passed without any action looking to such restoration. In fact, the second day after his report, Major Appel, through the influence of Collector Bailey, was sent to Iowa. "Bailey telegraphed for his orders to Washington and he got them."

After his return, about December 1, 1867, Deputy Commissioner Harland instructed Appel to make a second examination, which was minutely done by him, together with Messrs. Palmer and Johnson, and every barrel was gauged by a United States gauger. A like favorable report was then made. It is registered in the Internal Revenue Bureau thus: "Appel, Charles, a report on the bonded warehouse 58 and 60," and dated December 7, 1867; but neither of these reports can be found, though diligent search has been made for them by the Treasury officials.

At least it might be supposed that the claimants' property would then have been restored to them, but their exoneration, twice officially reported in writing to the Treasury, and twice made in person to the Deputy Commissioner of Internal Revenue, produced no effect. Not until about the 15th of December, 1867, did they succeed in removing the barriers which had closed their business, and then only to face its utter destruction. It was continued for some time merely in order to wind up their affairs.

The premises had been held without proceedings for forfeiture. They were now released without a charge or specification of fraud. As if to complete this vindication, the United States storekeeper, without whose connivance fraud on their part would have been impossible, was at once restored to his position.

Not long afterwards Collector Bailey fled the country, remaining abroad for years. His absence and the absolute ruin of the firm for a long time delayed any attempt at relief. Finally, after favorable reports in several Con-

gresses, fully reciting these wrongs, and that, from evidence before the committies, the seizure of the Cumming warehouse was groundless and illegal, resulting in financial disaster and very heavy losses to the firm, for which it was right that the Court of Claims should assess the damages, the act was passed to do them this tardy justice.

There was no serious dispute as to the facts, because they were mainly proved by officers of the Government, who were connected in one capacity or another with the seizure. Nor was there any serious dispute as to the amount of damage sustained because the testimony on the subject was uncontradicted. The claimants' damages were estimated at $597,268, and the items going to make up this estimate was furnished, but the Court below awarded only $36,000. The Court below held that the alleged seizure was made about the middle of November. By the report of the first commission the Government had knowledge that the seizure was wrongful, and the report of the second commission again imparted to it knowledge that the place had been improperly seized by its revenue officers in enforcing its laws in its name and as its act and for its benefit, and the property was not released until about the 15th of December, 1867. *The claimants proved that the seizure commenced before and continued beyond the period stated, but as they are bound by the findings made below, they are compelled to accept as controlling the dates as found by the Trial Court, and accordingly their argument will be based upon them.*

The Government, instead of repudiating the act of its officers, continued the seizure with full knowledge of all the facts. There is no reported case exactly like the one on trial, but the principle upon which the right of recovery is based, finds warrant in sound legal principles which this Court, with its vast and varied experience, will find no difficulty in applying.

The want of a precedent may be owing to the fact that without the consent of Congress evidenced by the passage of a private bill like the one allowing this action to be brought, the Court below, even under the various general

acts relating to its jurisdiction, would be without authority to determine such a controversy. The purpose of the present act was to supply this power. That Congress has not allowed other claims of a like character to go before the Court of Claims under private bills, may be, perhaps, owing to the fact that it has not before found a case of sufficient importance and merit to direct that Court to entertain jurisdiction thereof. Congress found sufficient merit in this claim to send it there, to the end that if the facts warranted and permitted, justice might be accorded to these claimants for the great injuries which they have sustained by the act of Government. It is certainly to the credit of any Government, that it is willing that justice shall be done to its citizens, and that it consents to take down the shield which stands between the citizens and the sovereignty by consenting to give the citizen a forum in which his grievances may be heard.

The Findings made by the Court below.

THE SEIZURE.

Although the sixth finding of fact states that "at no time did the Commissioner of Internal Revenue or the revenue board in New York authorize a seizure of the claimants' property, *and no seizure was in fact made*" (p. 20), the Court adds: "But for a period extending from about the 15th of November, 1867, to about the 15th December, 1867, *the claimants' business was interfered with and at times interrupted* by Collector Bailey and the revenue officers making examinations, *as set forth in finding III.*"

This general finding like a general verdict is controlled by a special finding of fact (Phelps *vs.* Vischer, 50 N. Y., 69), and the special findings in this case show that there was a *seizure.* Indeed, the sixth finding holds, "that the claimants' business was interfered with and at times interrupted," as set forth in finding III., and that finding contains official correspondence that proves what was done

The letter written by Collector Bailey to Commissioner Rollins stated November 23, 1867 (p. 14), commences with this suggestive language: "Sir,—*In the matter of the seizure of Cumming & Co., 60 Broad st.*," admitting thereby at the outset that there had been *a seizure*. Further on he says: "I did not feel warranted *in making a seizure until the 15th inst.*," and still further on he says that he had "notified Messrs. Cumming & Co., that *he would sieze on the street* any spirits of theirs going out of their store." In a subedquent letter (under date of November 29, 1867) Bailey wrote to Collector Shook that: "In consultation with Deputy Harland, on Wednesday, *he advised the closing of the warehouse* of Cumming & Co., 60 Broad street (p. 15). The fourth finding is more explicit (p. 18). It is in these words: "On the 7th Nov., 1867, the officers named in the communication of that date from Collector Bailey to Collector Shook, with another named Koop, went to the bonded warehouse 58 and 60 Broad street, and stated to the official storekeeper in charge that they were authrized by Collector Bailey '*to seize* the warehouse to make an examination.' The storekeeper demanded to know whether they held an order from Collector Shook, and in the absence of such an order, refused to admit them to the warehouse. The storekeeper then went and reported the facts in person to Collector Shook, who ordered that the inspecting officers be allowed to go in and make the examination. It continued for several days, and the warehouse was kept under surveillance, but no interference with the business of Cumming & Co. occurred, other than such as was incidental to an examination of their books, and of the stock in the store, *until the 15th November*, 1867, when Collector Bailey ordered the keeper in charge not to allow the removal of spirits, *and on the 21st* notified Cumming & Co., that he would seize on the street any spirits of theirs going out of the store." Further on the Court finds that "the business books of Cumming & Co. were *forcibly* taken from them by Collector Bailey under their protest and never returned (pp. 18, 19).

Seizure is synonymous with *levy* in a legal sense, and in order to constitute a levy a manual interference with the goods is not necessary. It is sufficient that they are present subject to the officer's control, and that he openly states that he levies on them, and asserts his authroity over them by virtue of the execution (Barker *vs.* Brinninger, 14 N. Y., 270). The test of a valid levy is whether enough has been done to subject the officer to an action of trespass, but for the protection of the execution (Roth *vs.* Wells, 29 N. Y., 471). Physical force is not necessary to constitute a seizure, for as the Supreme Court of the United States, said in *The Josefa Segunda* (10 Wheat., at p. 325): "If the party, upon notice, agrees to submit, and actually submits, to the command and control of the seizing officer, that is sufficient; for, in such cases, as in cases of captures *jure belli*, a voluntary surrender of authority, and an agreement to obey the captor supplies the place of actual force." This decision related to the seizure of a vessel near the mouth of the Mississippi river, and if the above rule states the law correctly the principle laid down *a fortiori* applies to the seizure in this case.

Knowledge in the Government found by the Court.

The fourth finding (p. 18) shows that the Commissioner of Internal Revenue, appointed a committee to examine the bonded warehouse, that the committee made two separate reports, *each to the effect that no cause for seizure existed*, the second report being dated December 7, 1867. The seizure was maintained after the first report, and for over a week after the second.

The Damages Awarded by the Court below.

The Court in its seventh finding decides that "at the time when Collecter Bailey forbade the removal of goods from the claimants' warehouse, as set forth in finding IV., there were stored and owned by them in bond 4,476 barrels of whisky and distilled spirits, and 347 barrels of

what were known as free goods." In consequence of the *detention* of these spirits and goods as set forth in findings III., IV. and VI., *and* the interruption of their business, *and the seizure* of their books by Joshua F. Bailey, Collector of Internal Revenue, acting under or with him, the firm of Joseph M. Cumming & Co. suffered damages in amount of $36,000.

The words "detention," "interruption" and "seizure" used in the seventh finding show that there was a *seizure* made within the full meaning of the term *levy* as interpreted by the Courts, for which a sheriff, who fails to justify, is liable in trespass. Our property was wrongfully impounded, and yet we could not maintain *replevin* to repossess ourselves of our property. The Government had it —not Bailey. He had no power outside of that with which the Government clothed him. What he did, it did.

THE LAW.

POINT I.

The liability of the Government under the special act.

The private act conferring jurisdiction on the Court of Claims admits the liability of the Government for acts such as are recited in the bill. Not that the acts which Bailey committed made the Government liable; that would not be a proper construction of the enactment, for they might upon examination turn out to be acts of an arbitrary and malicious character, for which the Government could under no circumstances be held liable, either

primarily or collaterally. But if they proved to be acts done by Bailey in the exercise of his duties as an officer of the Government, for which the Government was in any form responsible, then a recovery was to be had by the petitioners, and the Government was to discharge the obligation. This is the true intent and meaning of the act. And in aid of this construction we will presently refer to certain provisions of the Revised Statutes which show a Government liability for such acts. True, the language of the bill is that the Court is to pass on "the law and facts as to the liability of the Government;" but the act must be interpreted by the state of facts it was designed to meet, and what is fairly implied in an act is as much granted as what is expressed (Miller, J., in 101 U. S. R., 71). It certainly cannot be inferred that Congress sent these claimants to the Court of Claims for relief, under a bill which made the granting of the relief they sought impossible.

If such a construction is put upon the act, then the legislative and executive branches of the Government have been guilty of the most absurd piece of legislation that has ever covered the statute book of the nation, in wasting the time of these claimants and their counsel, as well as imposing on the Court the duty of listening to the controversy. The Court will not attribute such folly to the legislative and executive branches of the Government if it can find authority for granting the relief the act contemplated.

The act in words recites in detail the very wrongs of which we complain. The very acts of which we complain are recited in full in this bill, and we were sent to the Court of Claims that that Court might redress these identical wrongs. Of course, we understand that there is no general authority in that Court to right wrongs done to individuals by officers of the general Government, though they have been committed while serving the Government. In such cases claimants must procure the passage of a special act. We have obtained that special act in this case, and we are here under it, and we claim it is broad enough

to give that Court full and comprehensive jurisdiction and recognizes clearly the liability of the Government for the acts recited in the very bill itself, and these wrongs Congress intended should be remedied in that Court, and it has said so.

"*In such cases, where it is proper for the Nation to furnish a remedy, Congress has wisely reserved the matter for its own determination*" (*Langford* vs. *United States*, 101 *U. S., at p.* 346).

In Bonduit's case (11 *Wallace, p.* 621) the Court said: "If a wrong has been done, the power of redress is with Congress, not with the judiciary; and that body, upon being applied to, it is to be presumed will promptly give the proper relief." Congress was applied to, and in the exercise of its power in the premises, determined that Cumming & Co. were entitled to relief for the wrongs done to them, and passed the bill under which the present suit was commenced.

The title of the act denotes the intention of Congress.

It was *for the relief* of claimants.

It specified with great particularity the wrongs done to them; and if it did not mean to compensate for them, then the Court was empowered to consider a subject upon which no action was to be taken, a contention too frivolous to be seriously considered.

It has been time and again decided that when jurisdiction is conferred upon it by special enactment for relief, due regard will be had for the intention of Congress, and a liberal construction given to the law.

The Act of February 26, 1885, is in the nature of a remedial statute, requiring such rational and a liberal construction as will give effect to the just intention of Congress (*Roberts* vs. *U S.*, 92 *U. S. R.*, 41; *Cross* vs. *U. S.*, 14 *Wall.*, 483; *U. S.* vs. *Padelford*, 9 *Wall.*, 538).

It is the duty of the Court, in construing and giving effect to the statute, to consider the circumstances under which it was passed, and the manifest object to be accomplished by it (*U. S.* vs. *Anderson*, 9 *Wall.*, 65; *Slaughter*

House Cases, 16 *Wall.*, 67; *Cross* vs. *U. S.*, 14 *Wall.*, 483).

Congress was advised, and knew of the seizure, closing up and detention of Cumming & Co.'s bonded warehouses, the detention of their books, and the interruption and breaking up of their business. It knew this was done by Bailey as an Internal Revenue collector of the Government; the Senate and House Committees, after examination of the papers and affidavits, were of the opinion and so reported that this firm had been unjustly dealt with; that there was no ground for the seizure; that it was illegal and they should be allowed to present their claim to the Court of Claims for adjudication thereon. The opinion of Congress to the same effect is stamped in every line of the remedial law itself, which gives to the Court jurisdiction of a suit against the United States for the damages caused to claimants by Bailey and others *as Internal Revenue officers.*

Congress could not take the time to learn by testimony the extent of the wrong or the just measure of relief. That was properly deemed by the Legislature a subject for judicial inquiry.

The object of the act, expressed by its title, was to afford *relief* for the injuries which it recites.

It is true the language of the act does not state that the Court is to render a judgment, but the right of appeal to the Supreme Court is given, which can only be from a judgment.

Besides, the conferring of jurisdiction embraces every kind of judicial action upon the subject matter, from finding the indictment to pronouncing the sentence (*Hopkins* vs. *Commonwealth*, 3 *Metc.*, 460).

In *Thomas' Motion*, 16 *Ct. of Cl.*, *p.* 522, it was held that a claimant presenting a claim founded on a law of Congress *has a legal right to a definite adjudication*, and the power of the Court to afford that cannot be considered as interfered with by anything short of a lodgment of the power of definitive adjudication elsewhere. The first

grant of jurisdiction to that Court in the act creating it is "*of all claims founded on any Act of Congress.*"

We are aware that acts in derogation of the common law are to be strictly construed, and that acts conferring jurisdiction are of that character, but this construction must not go to the extent of making an act ridiculously absurd—that would not be judicial construction. The duty of the Court is to give some effect to an act, if possible, not to treat it as a nullity, as nothing. It is elementary that where a power is given everything necessary to the complete execution of the power goes with it.

The design and intent of the framer, when ascertained, must prevail, and no construction can prevail which cannot give the act some reasonable operation. That is also an elementary rule of law. A remedial act should be so constructed as most effectually to meet the beneficial end in view, and to prevent a failure of the remedy (Potter's Dwarris Statutes, 231). When any particular construction would lead to an absurd consequence, it will be presumed that some exception or qualification was intended by the Legislature to avoid such conclusion (SHAW, *C. J.*, in Commonwealth *vs.* Kimball, 24 Pick., at p. 370). The qualification in this case is, that if it be a case where liability in any form attached to the Government for Bailey's act, the petitioners are to have the benefit of that liability, and this Court is to enforce it.

"It is not the words of the law," says the ancient Plowden, "but the internal sense of it that makes the law; the letter of the law is the body; the sense and reason of the law is the soul."

There are three points to be considered in the construction of all statutes: (1) The old law; (2) the mischief, and (3) the remedy—that is, how the law stood at the making of the act, what the mischief was the former law did not provide for, and what remedy Congress has provided to cure the defect, and it is the duty of judges to so construe the act as to suppress the mischief and advance the remedy.

The Court will pardon us for citing plain elementary principles from elementary books in regard to the con-

struction of acts. We are aware of the fact that we are not enlightening the Court on the law; simply calling attention to it.

The former law required us to sue the officer, and in a proper case the Government made a recovery against him a recovery against it.

Bailey, the collector, fled the country; we could not reach the Government through him, and this act permits us to reach it directly. In other words, it permits us to avoid circuity of action, and to do directly that which the former law required us to do indirectly.

If, therefore, we could on these proofs have succeeded in obtaining against Bailey a judgment which would have created a Government liability, we have by force of this act been given a direct mode of redress against the one ultimately liable, namely, the Government, and this without going through the formula of an action against the officer first.

Now, could we have succeeded on these proofs and on the facts as we have stated them in recovering a judgment against Bailey?

It is an elementary rule that all public officers whose duties are not judicial are answerable in damages to any one injured by the careless and negligent performance or omission to perform the duties of their office, and where a Government official assumes an authority which the law does not warrant him in exercising, he is personally responsible.

Ex parte Milligan, 4 *Wall.*, 3.
Planters Bank vs. *Union Bank*, 16 *Wall.*, 485.
Mitchell vs. *Harmony*, 13 *How. U. S.*, 115.
Griffin vs. *Wilcox*, 21 *Ind.*, 370.
Johnson vs. *Jones*, 44 *Ill.*, 142.
Hough vs. *Hoodless*, 35 *Ill.*, 166.
Wilson vs. *Franklin*, 63 *N. C.*, 259.
Hogue vs. *Penn*, 3 *Bush.*, 663.

But where the injury was done in the exercise of orders from a superior authority, which the agent was powerless

to resist, the wrong may be the same, *but the remedy is by an appeal to the justice of the Government, or to such court of claims as the Government may* empower to hear and allow claims against itself. There can be no other remedy under such circumstances.

Durand vs. *Hollins*, 4 *Blatch.*, 451.
Ford vs. *Surget*, 46 *Miss.*, 130.
Sutton vs. *Miller*, 6 *Coldw.*, 593.
Despau vs. *Olney*, 1 *Curt., C. C.*, 306.

The old English doctrine, that "the King can do no wrong," has no application to American jurisprudence, because we have no King to whom the term can be applied (Langford *vs.* U. S., 101 U. S., 341).

Judge Cooley, in his work on Torts (pp. 122, 123), lays down the rule applicable to this class of cases. He says: "Towns, counties, villages and cities must respond for "such torts of their officers, agents and servants as have "been committed or suffered by corporate authority. "*Even the State or General Government may be guilty of* "*individual wrongs; for while each is a sovereignty, it* "*is a corporation also, and as such capable of doing* "*wrongful acts. The difficulty here is with the remedy,* "*not with the right.* No sovereignty is subject to suits, "except with its own consent. But either this consent "is given by general law, or some tribunal is established "with power to hear all just claims, or if neither of these "is done, the tort remains; and it is always to be pre-"sumed that the legislative authority will make the "proper provision for redress when its attention is "directed to the injury."

In regard to the liability of Bailey, it is almost needless to discuss that. There is no question about his liability for these acts. He went into the complainant's premises and made a seizure in the exercise of the functions of his office. He made a mistake. For that mistake he is liable. On the recovery of such a judgment against Bailey, let us see what position the United States Government would have occupied. Section 970 of the Revised Statutes pro-

vides that " when in any prosecution commenced on account of the seizure of any vessel, goods, wares or merchandise made by any collector or other officer under *any act of Congress authorizing such seizure*, judgment is rendered for the claimant, but it appears to the Court that there was reasonable cause of seizure, the Court shall cause a proper certificate thereof to be entered," &c.

Section 989 of the Revised Statutes provides that " when a recovery is had in any suit or proceeding against a collector or other officer of the revenue for any act done by him, or for the recovery of any money exacted by or paid to him and by him paid into the Treasury, in the performance of his official duty, and the Court certifies that there was probable cause for the act done by the collector or other officer, or that he acted under the directions of the Secretary of the Treasury, or other proper officer of the Government, *no execution shall issue against such collector or other officer, but the amount so recovered shall, upon final judgment, be provided for and paid out of the proper appropriation from the Treasury.*"

Section 3220 of the Revised Statutes provides : " *The Commissioner of Internal Revenue*, subject to regulations prescribed by the Secretary of the Treasury, is authorized on application to him made to remit, refund and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any as may be recovered against him in any Court for any internal taxes collected by him, with the costs and expenses of suit; *also all damages and costs recovered against any assessor, collector, deputy collector or inspector in any suit brought against him by reason of anything done in the due performance of his official duty.*"

Here was an act committed by Bailey in executing a law of the United States, in the name of the United States, for the benefit of the United States. He was liable to an action—no one will seriously question that—and on obtaining the certificate of probable cause, the liability of the Government was absolutely fixed.

Now, about this certificate of probable cause let us say a word, and go to another branch of the case. The statute provides, section 970: "And when in any prosecution commenced on account of the seizure of any vessel, goods, wares or merchandise made by any collector or other officer under any act of Congress authorizing such seizure, judgment is rendered for the claimant, but it appears to the Court that there was reasonable cause for seizure, the Court shall cause"—not may cause—"*shall cause* a proper certificate thereof to be entered."

So in every case where there is reasonable cause for the seizure, the Court *must* grant the certificate of probable cause, and the liability of the Government becomes fixed.

The certificate of probable cause has always been regarded as evidence of the fact that the recovery was for an act done in the due performance of his official duty, and this is granted almost as of course, unless the trial has demonstrated that the officer departed from his official duty, and for some purpose of his own was guilty of arbitrary or malicious acts.

Thus in U. S. *vs.* Riddle (5 Cranch, 312), MARSHALL, *C. J.*, said: "The Court thinks this case too plain to admit of argument or to require deliberation. It is not even within the letter of the law, and it is certainly not within the spirit. The law did not intend to punish the intention, but the attempt to defraud the revenue. But as the construction of the law was liable to some question, the Court will suffer the certificate of probable cause to remain as it is.

"*A doubt as to the true construction of the law is as reasonable a cause for seizure as a doubt respecting the fact.*"

If the collector makes a mistake in regard to the fact, there is no reason why he should not have a certificate of probable cause, if he acted in good faith, and had no purpose of his own to serve, no malice—no unnecessary oppression. Why not?

A certificate of probable cause will be given if the seiz-

ing officer acted in good faith, and had reasonable grounds to suppose that the law had been violated (U. S. *vs.* The Reindeer, 14 Law R., 235).

The subsequent action of the Government concludes it on the question of probable cause, and shows that if the action had been against Bailey the liability of the Government would have been complete.

The Government, by this special act, waived the necessity of a direct action against Bailey; now let us see what the act provides: "And said suit *shall be maintained*, any statute of limitations to the contrary notwithstanding." What statute of limitations? Could the Government interpose the statute of limitations as a bar to a claim like this? Certainly not. We never had our day in Court against the Government till this private act was passed. The statute never commenced to run against the Government till this private act was passed. What statute of limitations does Congress refer to? It is the statute of limitations against Bailey. We seek to hold the Government liable for Bailey's acts. The Revised Statutes provide that the Government is liable for Bailey's acts. They say to us, in effect, get a judgment against Bailey; we are ultimately liable and will pay that judgment. We are limited, however, in the time to bring the suit against Bailey. The statute of limitations would have applied to such an action. The Government could have claimed the benefit of that statute. But Congress, by this special bill, says to the United States Attorney-General "You shall not claim the benefit of the statute of limitations against Bailey." If it does not mean that, what, in all fairness, does it mean? It is meaningless unless it means that.

You can give effect to this act in no other way. It means that or it means nothing; showing a clear intention on the part of the Government that if Bailey was liable for these acts and the Government ultimately liable, so in the end the money would have to come from it, then the Government was to be held liable in this direct proceeding without unnecessary circuity of action. To this

extent the Government, by this special act, admits its liability. It is only a conditional admission, however, an admission founded on the principles stated, and on the pre-existing liability on the part of the Government, if the facts were sufficient to hold the Government if the action had been brought against Bailey instead of being brought directly against it.

We admit the proposition that as a rule the Government is not liable for the tortious acts of its public officers; but this is subject to certain well-defined qualifications, which will be considered hereafter. We admit that Bailey was a public officer, but deny that the general rule invoked, as to the non-liability of the Government for tortious acts, has any application to revenue officers acting in good faith and within the scope of their authority in seizing for the Government the private property of its citizens.

The action is not brought for a personal tort of an officer of the Government; it is brought for an injury to property. That is our theory of liability—an injury to the property of a citizen, for which the Government always makes just compensation. This rule pervades the entire law of the country, from the Constitution down, and it is that law we invoke here. Nor does the rule invoked by the Attorney-General as to non-liability for tortious acts of a public officer apply to cases where the act of the officer, however tortious in the beginning, has been avowed, adopted or ratified by the Government.

We further admit that the act of Bailey was tortious in the sense that it was wrongful as to us.

That although he did an act he had the power to do in the exercise of his office, it was tortious as to us, because he was mistaken as to the existence of cause for seizure, and hence as a ministerial officer became liable to us, whether his act was induced by what he regarded as probable cause or not.

How this question of probable cause is to be viewed depends entirely upon circumstances. In an action for false imprisonment or malicious prosecution probable cause is a perfect defense, and the probable cause in an action of

false imprisonment or malicious prosecution has been defined—the person must act as an ordinarily prudent man would, he must act on circumstances warranting a prudent man in arriving at the belief that crime has been committed. That belief, if justified by circumstances, is a complete defense to actions of that character. But it is no defense to a ministerial officer for the seizure of property.

Then there is another distinction to be observed with regard to probable cause, that is, as to what constitutes probable cause between the officer and the Government. We will discuss this distinction before we are done.

We properly allege a wrongful seizure. If we had alleged that the seizure was rightfully made we would have had no cause of complaint either against Bailey or the Government in this or any other Court.

Probable cause as to us and probable cause as between the officer and the Government are two different things.

Probable cause would have been no defense by Bailey to an action brought by J. M. Cumming & Co.

But if the action had been defended by the Government through one of its District Attorneys, so that the Government was represented, and probable cause was found to exist, the Government guaranteed the officer immunity by regarding the judgment as a liability against the Government, which its officers in the Treasury Department were authorized to pay and discharge. The officer toward his Government has probable cause if he acts upon suspicion, whether founded on facts or not. In other words, the Government which selects, directs and controls the officer, and they essentially do that in all internal revenue matters, agrees to pay for his honest mistakes or errors of judgment committed in good faith while enforcing its laws. The Government in these cases pays for mistakes --nothing else. If the seizure is proper, forfeiture follows, and there can be no possible liability on the part of the Government. It is only in case of mistake, in other words, where a wrong is done, or where the acts of the officer undertaken in good faith prove tortious, that the

Government liability attaches and it can be called upon to pay.

The Government has, by general statute, created a liability in this class of cases, and the common law rule, which might otherwise have prevailed, becomes as to such cases and such officers inapplicable. In declaring this liability, two sections of former laws were re-enacted in the Revised Statutes. I refer to sections 989 and 3220, *and it becomes immaterial to the determination in this case which section the Court holds to be applicable; both admit a Government liability. The only difference is in the mode of enforcing the liability.* By section 989, the certificate of probable cause authorized by the statute in suits against revenue officers operating as a stay of execution and relieving the officer from liability is, in effect, a judgment against the Government (Dunnegan's case, 17 Ct. of Claims R., 247; The U. S. *vs.* Sherman, 98 U. S., 565). Section 3220 authorizes the Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, without any certificate of probable cause, to pay all damages and costs recovered against any assessor, collector, deputy collector or inspector in any suit brought against him by reason of anything done in the due performance of his official duty.

The due performance of duty contemplated means honest performance of official duty—mistakes committed in good faith while executing the duties of the office. Recollect, the authority is not only to pay the costs of the defense, but all damages recovered.

The Government is to pay the damages for these very mistakes they call tortious acts.

Recoveries for damages in these cases are only permitted where wrongs have been committed, where the officer has, as in this case, made a mistake or committed a tortious act with respect to property.

A certified copy of the record, and the certificate of probable cause authorized by section 970 of the Revised Statutes, are generally accepted as conclusive on the Treasury

Department. By them the Government liability is deemed fixed.

In the Dunnegan case, the department refused to be bound by the certificate, and the department was sustained chiefly on the ground, however, that the defense of the officer was conducted by the private attorney of the officer sued and not by the public officer assigned by the Government to conduct such defenses. That the Government having no notice of the suit and no opportunity to defend was not concluded by the judgment. That is good elementary doctrine. The record in that case charged a malicious act on the part of the officer, for which the Government could in no manner be made liable, and it is difficult to reconcile the giving of a certificate of probable cause for a malicious act, unless by some means, not made to appear, the element of malice disappeared from the case. The opinion of this Court in that case refers particularly to the fact of the allegation of malice, and how a certificate of probable cause could be given in a case where the officer was guilty of malice, is something we cannot comprehend, unless, as before remarked, the malicious element in some way or other dropped out of the case.

No malice is charged in our case and none proved, and it is fair to assume that if, on these proofs, we had recovered a judgment against Bailey, for acts done by him within the scope of his authority as an officer of the Government, committed without malice or private motive, and solely in the interest and for the benefit of the Government, that the Treasury officials would have performed the duty and exercised the authority which the statute confers to discharge such judgment as a Government liability.

These Treasury officials are public officers. The law will presume that they, like other public officers, will do their duty faithfully and impartially, and if we have presented a proper case the inference and presumption are that we would have obtained the benefit of these acts. Presumption is proof. Anything the law presumes need not be proved. It proves itself. The law recognizes this class of claims as

Government liabilities. It will not be claimed by any one that the Government undertakes to pay the private debts or liabilities of its internal officers, however just they may be. There is no authority for that. The policy of the different acts is to discharge Government liabilities incurred by seizing property for Government purposes. That is the policy of the Government.

Liabilities in form against the officer, in fact, against the Government.

In form against the officer, because without a special act such as we have, the claimant can reach the Government in no other way. In fact against the Government, because the judgments are assumed by the Government and paid from its treasury, and the act of paying them, where there is a certificate of probable cause, if it is under section 989, is a mere ministerial act. It is to hand over the money. That is all.

It has been said that these statutes are for the benefit of the collector—that is true. They are likewise for the benefit of the creditor. In the U. S. *vs.* Sherman (98 U. S., 565), the Court held that the certificate of probable cause may be had by either party, and declined to allow the judgment creditor three years' interest upon his judgment, because of his neglect to obtain the certificate. "The plaintiff," said the officer, "has not obtained the certificate." The U. S. Court said, "Why didn't you obtain it? You were entitled to go and get it, and if you have lost three years' interest, you have lost it by your own fault and neglect." Now, if the claimant has no interest in these statutes or in the certificate, why was this ruling made by the Supreme Court of the United States? The creditor has an interest in these statutes; he has an interest in the certificate, and may go and get it, though the officer neglects to get it, or even if the officer does not wish it. The running of interest in a case of that kind starts from the time of filing the certificate, and it was the fault of the creditor that the certificate was not obtained sooner, and he got interest only from the time the certificate was filed. Even under section 3220 the creditor

has such an interest in the statute, as to call upon the Commissioner to act.

Any statute that concerns the public or individuals, gives the individual such an interest in the matter to which it relates that he may enforce it. That doctrine has been frequently held by our Courts (Martin *vs.* The Mayor, &c., 1 Hill, 545; Malcolm *vs.* Smith, 5 Cow., 188); although as the power committed to the Commissioner in this instance involves a certain amount of discretion, mandamus would not have required this officer to act in any particular way. It would require the Commissioner to act upon the application, however. It would at least have set him in motion.

Mandamus can do that, and in the United States Court where a judgment is recovered, it may be made the basis of a mandamus proceeding, so that after judgment against the officer making the seizure, mandamus will lie to set the officers of the Treasury Department in motion as to its payment, and the presumption is that when set in motion they would have discharged their duty fairly and honestly; that the judgment, if in a proper case, would have been paid and discharged by them from the Treasury of the United States. I say all these presumptions are in our favor, and presumption is proof; for what is presumed need not be proved.

A word or two in reference to section 989. It has been intimated, but never expressly decided, that this section did not apply to an Internal Revenue collector. Judge BLATCHFORD, in Campbell *vs.* James (18 Blatchford, 196), decided that it did not apply to a postmaster, and incidently said that it applied only to revenue from customs. It was a mere incidental remark, referring to the statute by description. As originally passed, this observation was true, but when the jurisdiction of the Treasury Department was extended over this class of cases, it may be fair to argue that the provisions of section 989 were extended to both, unless by construction 3220 is regarded as indicative of a legislative intent to have the new jurisdiction regulated by the new provision.

That may be the proper construction; we are not going to argue that it is not; but we claim that it is still an open question; and assert that the act passed originally in regard to customs from imports has never been judicially decided not to apply to Internal Revenue officers. The question was not argued before Judge BLATCHFORD. If it had been before Judge BLATCHFORD, he might have found that, although as originally passed it applied to customs from imports, yet by construction in view of the enlarged jurisdiction of the Treasury Department it might be extended to revenue officers. We are not going to argue whether it should be so construed or not. For our purpose either act indicates the liability which we claim can be enforced against the Government. Of course, in extending jurisdiction—if the jurisdiction of a Court, for example, is extended to a new class of cases, Congress does not re-enact the old laws. They remain. The new jurisdiction is merely added. The old law is by necessary implication extended to the new. All these regulations apply to the Treasury Department, whether relating to revenue from imports or from internal revenue sources.

But be this as it may, either section fixes a Government responsibility in a proper case of seizure of property, and we want that question of seizure of property kept prominently before the Court; and as the Government has waived the recovery of a judgment against Bailey as a preliminary to enforcing the Government liability, it has, as a necessary consequence, waived the certificate of probable cause, and the approval of the Commissioner of Internal Revenue, if this be a case in which such certificate and approval would, in the ordinary nature of things, have been granted. Both sections of the statute demonstrate a general purpose to protect all revenue collectors.

The Government knew we had not sued Bailey. The Government knew that the Statute of Limitations might have run against Bailey; but they said "we will waive the Statute of Limitations against Bailey, and you come in and sue us directly. In other words, we will allow you to do directly that which, without this special act, you

would have to do indirectly." "We waive this formal circuity of action." Now, both sections of the statute, as we said before, demonstrate a general purpose and policy on the part of the Government to protect all revenue officers in case of seizure of private property.

In this connection and on the additional theory that this was an act of Government, let us ask, suppose Bailey had died the day after making the seizure, would the wrong and remedy have died with him?

His death would not have released the seizure nor returned our property. Who would the seizure have been continued by? Agents of the dead man? No. A dead man can have no agent.

The Government would have continued the seizure. It continued the seizure in this case for over a month. It was its act. This is not a case of wrong without a remedy. The waiver of sovereignty by the Government has given us the remedy. The death of Bailey would not have defeated this action nor affected it in any way. Judge Cooley, in his work on Torts (pp. 122, 123) says the difficulty in such cases is with the remedy, not with the right. The right may exist. The trouble is in getting at it, in enforcing it. Here, sovereignty has been waived, and we have both the right and the remedy.

It has been suggested that if J. M. Cumming & Co. committed no violation of law, neither the President, nor any member of his Cabinet or all combined, could seize their warehouse.

Cabinet meetings are not called to deliberate on such subjects as a general rule. That detail of the Government devolves upon the Secretary of the Treasury, and through him upon the Internal Revenue Commissioner, and through him upon the numerous collectors throughout the United States. If it was made known to the Secretary of the Treasury or the Commissioner of Internal Revenue that reasonable cause existed for believing that fraud against the revenue was being committed by J. M. Cumming & Co. in the management of their warehouse, it would certainly be the duty of these officers to direct a

seizure, and if Bailey, by the command of the Government, made the seizure and the Treasury Department had the power to command him, would there be any doubt of its liability?

POINT II.

The proper construction of the special act.

The Act of February 26, 1885, is in the nature of a remedial statute, requiring such a rational and liberal construction as will give effect to the just intention of Congress (Roberts *vs.* U. S., 92 U. S. R., 41; Cross *vs.* U. S., 14 Wall., 483; U. S. *vs.* Pudelford, 9 Wall., 538.)

It is the duty of the Court, in construing and giving effect to a statute, to consider the circumstances under which it was passed, and the manifest object to be accomplished by it (U. S. *vs.* Anderson, 9 Wall., 65; Slaughter House Case, 16 Wall., 67; Cross *vs.* U. S., 14, Wall., 483).

Congress was advised and knew of the seizure, closing up and detention of Cumming & Co.'s bonded warehouses, the detention of their books, and the interruption and breaking up of their business. It knew this was done by Bailey as an Internal Revenue Collector of the Government; the Senate and House Committees, after examination of the papers and affidavits, were of the opinion, and so reported, that this firm had been unjustly dealt with; that there was no ground for the seizure; that it was illegal, and they should be allowed to present their claim to the Court of Claims for adjudication thereon. The opinion of Congress to the same effect is stamped on every line of the remedial act itself, which gives to the Court jurisdiction of a suit against the United States for the damages

caused to claimants by Bailey and others as Internal Revenue officers.

Congress could not take the time to learn by testimony the extent of the wrong or the just measure of relief. That was properly deemed by the Legislature a subject for judicial inquiry. *The object of the act, expressed by its title, was to afford relief for the injuries it recites.* Counsel for the Government seem to consider it a defect that the language of the act does not state that the Court is to render a judgment. This is a requirement which cannot avail. The right of appeal to the Supreme Court is given, which can only be from a judgment. Besides, the conferring of jurisdiction embraces every kind of judicial action upon the subject matter from finding the indictment to pronouncing the sentence (Hopkins *vs.* Commonwealth, 3 Metc., 460). Whenever a judicial power is conferred by statute, everything necessary to make it effectual or requisite to attain its end, is implied (People *v.* Chapin, 105 N. Y., at p. 316). In Thomas' motion (16 Ct. of Cl., p. 522), it was held that a claimant presenting a claim founded on a law of Congress *has a legal right to a definite adjudication*, and the power of the Court to afford that cannot be considered as interfered with by anything short of a lodgment of the power of definite adjudication elsewhere. The first grant of jurisdiction to this Court in the act creating it is "*of all claims founded on any act of Congress.*"

The special act of Congress has set the question of jurisdiction at rest, if that question ever arose to the dignity of a doubt.

By this private act, the Government permitted itself to be sued for the several grievances suffered by Cumming & Co., set forth in the law itself. What was the object of Congress in authorizing the suit? Certainly not to have a finding that in no event could the Government be liable for the acts of its officers specially enumerated in the bill. Such an interpretation would impute to Congress that it authorized a suit for relief under a bill and in a case in which the granting of any relief was impos-

sible. The intent of Congress was to ascertain whether the damages were due in any respect to the action or inaction of the Government, and, if so, to find and give judgment for the proper amount of compensation. If in no event could such liability be fixed upon the United States, why give *either party* the right of appeal, as in ordinary cases, against the United States? It may certainly be said, as in Valdez case (16 Ct. of Cl., p. 550), where a claim, barred by statute, was referred to that court by Congress: "It will proceed according to the legislative will to adjudicate such claims * * * the purpose of the statute was plain from the first, and its language, *interpreted by its purpose*, bears but one construction and leads to but one conclusion."

Where the damage arises entirely from the tortious acts of its officers, the Court of Claims has not, under the general law, any jurisdiction of a suit against the Government for such acts. Even, were this such a case, the special Act of July 26, 1885, confers such jurisdiction. The sovereign power has waived its privilege and permitted itself to be sued in order that justice may be done. It is said in Gibbons *vs.* U. S. (8 Wallace, 269), that this cannot be done without a special act of Congress. The requirement then has been supplied in the present instance.

In the McClure case (116 U. S., 145) and Tillson case (100 U. S., 43), this Court, in construing private bills, held that the Government did not, by sending a claim to the Court for adjudication, admit a liability on the claims so sent—this is true. But the Government certainly admitted its liability on claims of that character, if properly established by proofs, and this is all we claim for the Cumming bill, *i. e.*, that the Government admitted its liability on such a claim if the facts going to make out the claim were established by evidence.

POINT III.

The Government adopted the act of its officers.

If the act of Collector Bailey, in making the seizure, did not impute notice to the Government of the fact, the report made by the first Commission appointed by the Government to the effect that the seizure was wrongful, charged it with notice of the Commission of a wrong in depriving the claimants of the use of their property.

This was the *locus pœnitentiæ*. The Government should then have disavowed the seizure, but it did not. It continued Governmental control for over a week after the second commission made its report, that everything in the warehouse was right. There can be no question about the right and power of the Government to avow an act of its officer. Where a government consents to be sued, it waives its sovereignty; it ceases to be a sovereign power; it comes into Court like any other litigant. It becomes, if we may use the phrase, for the purposes of the litigation, a national corporation. It becomes in this respect like a municipal corporation. It may ratify an act, just as a municipal corporation may ratify an act, and it ratified this act.

In Weed *vs.* The U. S. (16 Peters, p. 359), the Court said:

"In respect to the point made, as the validity of the original seizure, or of the causes thereof, we are of opinion that the first instruction of the district judge was entirely correct. It is of no consequence whatsoever what were the original grounds of the seizure, whether they were well founded or not, if in point of fact the goods are by law subjected to forfeiture, for the United States are not bound down by the acts of the seizure to the causes

which influenced them in making the seizure, or by any irregularity upon their part in conducting it, if in point of fact the seizure can now be maintained as founded upon an actual forfeiture thereof at the time of the seizure; and therefore it was rightly held by the judge that no question arose upon the issues which the jury were to try, except upon the causes of forfeiture alleged in the information. The remarks just made constitute an answer to the argument upon the demurrers to the first two pleas of the claimant; for, as had been already suggested, if a seizure has been actually made and is a continuing seizure, it is no bar to proceedings thereon that the cause of forfeiture relied on is not the same upon which the seizure was originally made. *It is sufficient for the United States that it* ADOPTS THE SEIZURE and now proceeds for a good cause of forfeiture, although utterly unknown to the original seizors."

Therefore, the Government had a right to adopt the act of Bailey. It had the right to make it an act of its own, and it did make it an act of its own by maintaining the possession he took for it.

The Government did not disavow the seizure, but adopted it. It was bound to do one thing or the other. It was either a seizure by the Government or it was not; and when actual knowledge was communicated to the Government it was called upon to act. It did not disavow. It did not release its hold; but maintained it. This amounted to a clear avowal, a clear ratification by the Government of the act of this officer. The Government adopted the seizure, and is responsible for it, independent of the several acts of Congress, to which attention has been called.

The act of Collector Bailey was not an act of malfeasance or non-feasance in office. It was not *ultra vires*. It was performed as an act of Government, in the name and for the profit of the Government, and not for any private benefit of his own. It was done under color of the acts of Congress delegating governmental authority to certain subordinates of the Government. It was executed by him

under the discretion confided in him under these acts; and while he erred in judgment, his official position shielded him from criminal prosecution or from actions of replevin to regain the possession which he wrongfully assumed.

The seizure met the the approval of his superior officers, who for the time at least, acting in concert with him, enforced and maintained it.

Whether Bailey was liable in the first instance or not becomes immaterial, as the ratification and *avowal* on legal principles, bound the Government, in whose interest and for whose benefit the seizure was made, as a party to the wrong *ab initio*. It therefore matters not which conclusion is adopted, *i. e.*, whether the Government is holden on the theory of original liability or by its *avowal* of the act. It is liable on one of these theories if not upon both.

The report of the first commisson brought home knowledge to the Government that the seizure was improper, as no grounds therefor existed, and still the Government did not disavow the seizure but sustained it, clearly showing an intention on the part of the Government not to treat the act of Bailey as one out of the path of duty or for motives of his own, but as an act performed by him within the scope of his authority, which the Government sanctioned and by maintaining possession sustained and adopted.

If the Government intended to disavow the act of Bailey, what should it have done? It should have immediately turned back the control of this property to us, and allowed us to resume our business. The Government knew that Bailey had seized the property in its name and as its act, and they knew that by the seizure, control had effectually passed from us to the Government, as much so as possession effectually changes by the levy of a sheriff, who makes an inventory of the goods seized, and has a man put in charge to represent him. By the seizure or levy the title of the property is for the purpose of the seizure or levy changed. A removal of one article after the levy by a sheriff would be larceny by the person taking

it. Even if taken by the judgment debtor, it would be larceny. He has no power to remove the property levied on. Therefore, if the Government wanted to disavow the act they should have returned the control of the property to us. They should, if we may use the term, have released the levy. They declined to do that, but maintained the seizure and excluded us from all control.

It had the right to treat the seizure as the unauthorized act of Bailey, committed out of the path of his duty, by promptly refusing to sanction or continue it.

But the Government didn't do this—it maintained the seizure after knowledge of the fact that no grounds for the seizure existed. The report made by the first commission and by the second commission each brought home knowledge to the Government in an official form as clearly and positively as notice was capable of being given, and still the Government did not disavow the seizure, but maintained it, clearly showing an intention on the part of the Government not to treat the act of Bailey as one out of the path of his duty or for motives of his own, but as an act performed by him within the scope of his authority, which the Government sanctioned, and, by maintaining possession, sustained and adopted. The Government in this manner avowed, adopted and ratified the act, as effectually as avowal, adoption or ratification by the Government is possible. How does the Government avow or adopt an act? In avowing an act, the Court in Brown *vs.* Denman, 2d Exch., 167, said: "The ratification need not be under the great seal. It may, like a command, be oral."

The evidence of it need not be express, for it may be implied, and the act of the Government in dealing with the subject is the strongest evidence of its intention and purpose

The Court in the same case said: "The subsequent ratification by the Government is equivalent to an original command."

The Government has a right to make the act of its officer an act of its own. So, for the purposes of this case,

Bailey is to be regarded as having done that which the Government commanded him to do. The communication on file in the State Department at Washington, and referred to below, shows how public acts are avowed. The British Minister, it appears, communicated to the Department of State that the British Government avowed the act on account of which one McLeod had been arrested and put on trial, as an act of public duty owing by him to the British Government. He said to our State Department that the British Government avowed that act. Our Secretary of State and President officially declared in their communication that, under the circumstances, no responsibility for the act could be thrown upon McLeod, and that our Government regarded the question as a political question to be discussed between the two Governments. This was regarded as a sufficient avowal of the British Government.

Under date of March 15, 1841, a communication addressed to Hon. John J. Crittenden, Attorney-General of the United States, subscribed by Hon. Wm. H. Harrison, President, and by Hon. Daniel Webster, Secretary of State, speaking for the Government of the United States (see communication on file in State Department at Washington, D. C.), said: "It is the object of this letter to "state to you certain important facts to be used by you, "or by others, as occasion in your judgment may require. "Which facts are, that on the 12th day of this month, "Henry S. Fox, Her Britannic Majesty's Minister, accredited to this Government, made a formal and official "communication to the Department of State by instruction of Her Britannic Majesty's Government. In this "communication it is explicitly declared and avowed, that "the transaction on account of which Alexander McLeod "has been arrested and is to be put on his trial, was a "transaction of a public character, planned and executed "by persons duly empowered by Her Majesty's colonial "authorities to take any steps, and to do any acts necessary for the defence of Her Majesty's territories, and for

"the protection of Her Majesty's subjects, and that con-
"sequently those subjects of Her Majesty who engaged in
"that transaction *were performing an act of public duty,*
"*for which they cannot be made personally and individu-*
"*ally answerable to the laws and tribunals* of any foreign
"country; that the transection may have been justifiable
"or not justifiable, but that they regard that question as
"a political question to be discussed between the two
"governments, *and that any responsibility for partici-*
"*pating in the transaction cannot be thrown upon indi-*
"*viduals,* who under the sanction, or by the order of the
"constituted authorities of their own government, en-
"gaged in it as a military enterprise." This communication, duly certified, was sent to the Hon. Joshua A. Spencer, attorney for the United States for the Northern District of New York, who was assigned as of counsel for McLeod, who was subsequently tried and acquitted mainly upon the legal grounds stated in the above letter. This communication shows the views of the Government in regard to the acts of public officers, *avowed* subsequently by their Government.

We do not mean to say that the British Government could not even afterwards have disavowed the act of its minister. It could. It might have said: "The minister is mistaken in the attitude this Government takes." We have no doubt about that. But standing unchallenged, it was the act of the British Government itself.

In the case of Weed *vs.* U. S., 16 Peters, 359, the Supreme Court of the United States distinctly declared that the United States are not bound down by the acts of seizors to the causes which influenced them in making the seizure, for if the seizure can be maintained on any grounds warranting forfeiture, the United States may proceed, and in the language of the Court: "It is sufficient for the United States that it *adopts* the seizure and now proceeds for good cause of forfeiture." Whether the term ratification, as applied to Government, is called avowal or adoption is of no consequence, as the three terms have the some meaning. The Government, having thrown down

its shield of sovereignty, is to be regarded, for the purposes of this case, as a national corporation, and may be likened in many respects to a municipal corporation so far as the rules of law applicable to it are concerned. The doctrine of ratification of the acts of an agent is as applicable to corporations as to individuals, and such ratification of acts done on behalf of a corporation may be inferred from the acquiescence of its directors or other governing body of the corporation, and from the circumstance that after the facts have been brought to their knowledge they have taken no measures to show dissent (see Peterson *vs.* The Mayor, 17 N. Y., 499; *Ib.*, p. 584; Woodbridge *vs.* Proprietors, &c., 6 Vt. 528; Hoyt *vs.* Thompson, 19 N. Y., 207; Dillon on Municipal Corps., sec. 385; Law *vs.* Cross, 1 Black, 533; Coureier *vs.* Ritter, 4 Wash. C. Ct., 549; Gold Mining Co. *vs.* National Bank, 96 U. S., 640).

Ratification by Acquiescence.

That ratification of acts done in behalf of a corporation may be inferred from the acquiescence of the directors or other governing body of the corporation, from the circumstance that after the facts have been brought to their knowledge they have taken no measures to show dissent (see Woodbridge *vs.* Proprietors, &c., 6 Vt., 528; Hoyt *vs.* Thompson, 19 N. Y., 207).

In this case the facts were brought to the knowledge of the Government in an official form by the reports of two commissions. The Government, instead of showing dissent and turning back the control to us, maintained its control. It took no measure to show dissent.

These are elementary principles in regard to the law of ratification or adoption or avowal. It makes no difference which terms you use.

"Corporations," says a learned law writer, are not created to commit torts. It is no part of their business to commit torts. Nevertheless, courts of law have decided that they must be held liable for torts committed by their

agents and servants acting within their authority, and upon the same principles and by precisely analogous reasoning as they have been made responsible for fraud, trover, trespass and the like" (see Green's Brice Ultra Vires, 262).

The courts have gone so far as to hold that corporations may commit assault and may be guilty of libel, false imprisonment and malicious prosecution, in which the element of malice is a prerequisite to recovery, yet the corporation may, in the exercise of its powers, go so far in the way of a ratification as to possess all these elements of wrong. If we were suing an ordinary corporation instead of the Government, would there be the slightest doubt as to ratification in the case?

If we were suing a municipal corporation, would there be any question about proof of ratification in this case? The agent of the corporation seizes our property; we notify the corporation and beg the corporation to release its hold; it declines to do so, but appoints other agents to ascertain the true condition of the facts, and after knowledge acquired from the reports of two separate commissions appointed by it, that no ground for the seizure existed, it still maintained its possession of the property and inflicted the damage that had been proved in this case. Would any one pretend for a minute that ratification had not been thoroughly and completely established, and that the act, if unauthorized in the first instance, had not by the ratification been made the act of the corporation itself, which is in the language of the books equivalent to an original command? If the Government sued upon an unauthorized contract made by its agent, would not that be a ratification by the Government of the agent's act?

In other words, treating the unauthorized act as authorized is equivalent to original authority. This rule holds good as to governments, corporations or individuals.

A principal can always sue and claim the benefit of an act unauthorized in the first instance by his agent. The bringing of the action is a ratification of the act. It makes

the act the act of the principal. The act is adopted. If the Government had brought such a suit on an unauthorized contract the defendant could not come in and say, "Your agent had no power to make this contract." The Government might, in the first instance, before ratification, have said that. The defendant could not say that after the act is adopted. By the operation of law it becomes the contract of the Government.

A recognition of the acts of an agent by a principal is equivalent to an original grant of authority (Comm. *vs.* Penn., Fet. C. Ct., 496; Clark *vs.* Van Reinsdyk, 9 Cranch, 153: Commercial Bank of Buffalo *vs.* Warren, 15 N. Y., 577).

Does the Government in dealing with its citizens expect to be governed in a court of law by the ordinary rules for dispensing justice between one citizen and another or its citizens on one hand and corporations on the other, or does it, after throwing down the shield of sovereignty and consenting to be sued as a private individual, still claim and insist that it has rights and privileges that do not belong to others and that it is to be the sole judge of the rules by which justice is meted out? It may decline to give a claimant a forum, but it cannot be that after permitting itself to be sued, that the Government has one law as to its citizens and another for itself, exacting from the citizen the strictest sense of justice and granting him in return that which almost amounts to a denial of it?

The Government owes certain duties to its citizens. It owes the duty of protection not only to life, but to property. It is a duty absolutely owing by the Government to its citizens, the protection of life and the protection of property, the duty to protect life being general, and therefore incapable of redress in case of neglect, but the duty to protect property is by the Constitution and laws made specific, so that any individual who obtains a forum has his remedy for the wrong. The Government owed a duty to us. When it was officially informed that there was no cause for this seizure that duty attached, and the duty

was to immediately release Governmental control and return that control to us.

But the Government in this case has gone beyond this point. It sent the case to the Court of Claims that justice might be done. Of course every government must, in the nature of things, being a sovereign power, determine whether it will permit itself to be sued or not. The Government has in this case gone beyond that point. It has consented to be sued.

It sent the claim to the Court of Claims that justice might be done according to the rules of law. The bill sending the case there looks forward to compensation for injuries alleged to have been done by a revenue officer, within the scope of his authority and in the line of his duty.

If the facts prove the injuries, and the case appears to be one for which on principles of justice a fair ground for liability exists, the Government intended that that liability should be enforced. In this respect the Government has done its duty, and the responsibility is, by this act, put on the judiciary, which will undoubtedly do its duty.

POINT IV.

The source and propriety of the liability considered in a general way.

In Johnson *vs.* The U. S. (2 Ct. of Claims), at p. 415, the Court, in an opinion by Judge NOTT, said: "Both by the prayer of his petition and the argument of his counsel he has treated the entry of the Government as a trespass upon his land; and he has also given evidence of certain arbitrary and unnecessary acts of one of the mili-

tary commanders, as apparently an aggravation of his damages. To any one familiar with the decisions of this Court it is needless to say that here the claimant has mistaken his rights. The Court has again and again held to the principle of the common law that the Government cannot be sued in actions in tort, nor made liable for the tortious acts of its officers. *If a military officer left the path of his official duty to vex or oppress the claimant, he thereby becomes liable to the claimant and might have been sued like all ministerial officers.* But the Court has also held to the principle of the common law that the Republic does no wrong, and to the provisions of the Constitution, 'nor shall private property be taken for public use without just compensation,' and by virtue of these it always has been held that a party might recover upon the implied contract as though the property had been acquired under an agreement of purchase, leaving the price undetermined."

Our property was taken by a Government officer for a Government purpose. The theory of the seizure was that the property had by forfeiture become the property of the United States. True, the property had never been declared forfeited, but the seizure looked forward to forfeiture, to a sale of the property for the benefit of the Government. The proceeds of the sale would have gone into the Treasury of the United States.

The proceeds would have represented the property and in legal effect the property would have been appropriated by the Government. The Government had no right to take it, and should pay its value.

It returned part of the property, not all. We got back less than the Government took—the proof shows this, and what we got back had depreciated in value.

The taking, in the Johnson case, was by a military officer in Oregon, without the knowledge of the Secretary of War or the President, or any officer of the Government. He was doing it on his own account. There was no pressing emergency of war which required the taking—the act of the officer was tortious—but it was the taking

of private property for Government purposes, and the Court directed the Government to make full compensation for all the property that had been taken.

We do no not claim that the Constitution applies to this case directly, but assert that it shows the policy of the Government all the way through, first in the Constitution, second in these two acts, next in this private act, that injuries to private property shall be compensated for, and that the compensation shall be just.

In the Indian case, suppose the military officer had seized one hundred head of cattle, and the next day the Indians had raided him, and had taken the one hundred head of cattle away; a claim is made to the Government; it is sent to Court for adjudication. According to the theory of the Attorney-General, the Government would not have been liable, because it got no benefit. True, it took the property; but it was taken away from the Government the next day. It, therefore, had no benefit from the property.

True, the Government never declares war upon Indians. Commanders do occasionally.

Now, if the Indians had raided the military and taken these one hundred head of cattle, the Government would clearly have been liable for the cattle, and Indians do occasionally make raids upon an army.

Poor Custer thought they didn't and paid the penalty. He thought he was raiding the Indians, but found they were raiding him, not the only mistake that has been made in the customs of warfare peculiar to Indians.

Suppose a man takes my watch: I can maintain an action *in trover* for the conversion of the watch—no question of that—he is liable for the taking. Suppose somebody steals it from him the next day; is that a defense? True, he might say, If I had not taken it from you somebody might have stolen it from you. That don't necessarily follow. At all events, it don't justify his wrong. He is liable for the taking. As soon as property is taken by the Government the liability attaches; there is no question about that. Suppose the Indians, instead

of taking away the one hundred head of cattle, had taken away fifty, and in the meantime supplies had come, and the officer returned the fifty head of cattle on hand in a damaged condition, and a claim had been made and sent to Court for adjudication; what measure of damages would be allowed in a case of that kind? For the fifty head of cattle not returned? No. Just compensation would require the Court to allow for the fifty head of cattle not returned and for the difference in value of the cattle returned between what they were worth at the time the cattle were taken away and the time when they were returned—the depreciation in value, which is always considered an essential element of damage in cases of the taking of property. Any Court would have allowed that. No Court could say that they granted the claimant *just compensation* without doing that.

Our property was taken by a Government officer for a Government purpose. The theory of the seizure was that the property had by forfeiture become the property of the United States. True, the property had never been declared forfeited, but the seizure looked forward to forfeiture, to a sale of the property for the benefit of the Government. The proceeds of the sale would have gone into the Treasury of the United States. The proceeds would have represented the property, and in legal effect the property would have been appropriated by the Government. The Government had no right to take it, and should pay its value. It returned part of the property, not all. We got back less than the Government took—the findings show this—and what we got back had depreciated in value. It matters not whether it was from leakage or what it was from. The control of this property had changed. That is the best evidence of a seizure. The control changed from us to the Government. Prior to the seizure we could take whisky out of our warehouse on paying the tax. After the seizure we could get nothing out. There was an entire changed of control. What we controlled before in running our business the Government controlled after the seizure was made, and it was while the Government con-

trolled this property, that is, while it had the property under seizure that the injury was done, and it gave us back but part of what was taken. It will not do to say the Indians stole the whisky, or that the Indians stole the cattle, or that the whisky leaked out. The Government is bound to return it or pay for it. The Government did not return it. We never got the property back. The taking in the Johnson case was by a military officer. He was pursuing Indians without the knowledge of the Secretary of War or the President. There was no pressing emergency of war which required the taking. The act was tortious, but he took the property, and the Court directed the Government to make compensation for it.

True, the Constitution does not in words provide for such a case; it merely says, "nor shall private property be taken for public use without just compensation." This refers to the right of eminent domain, and as preliminary to the exercise of the right of eminent domain provision must be made for indemnifying the injured party.

That is the elementary rule in regard to eminent domain. You may take anything you like for public use; but before you take it, you must make some provision, so that after you get it, the party has the means of getting his money.

Yet this Court practically declared the taking to be an "exercise of *the* right of eminent domain" (see Grant *vs.* U. S., 1 Court of Claims, 41; 2 Court of Claims 551; Wiggins *vs.* U. S., 3 Ct. Claims, 412). The Constitution does not recognize military necessity, nor any other necessity whatever, as an authority for "taking private property for public use" in peace or in war, without just compensation (Norris *vs.* Donophan, 4 Metc., (Ky.), 385. Corbin *vs.* Marsh, 2 Duvail, 193).

We don't refer to *destruction* of property caused by the necessities of war, but mean the *taking* of property either in peace or in war requires compensation by the Government. Destruction of property by the necessities of war may stand on a different basis.

The Government appropriated this property for over a month and then returned only part of it. The Government may as well call it an "exercise of the right of eminent domain" as an act performed under the Internal Revenue law, for it finds no warrant for its conduct in the Internal Revenue law. There was no cause for the seisure. The Government seized private property without cause, and if our facts have been established, Congress intended that compensation should be made, not for acts committed by Bailey," out of the path of his official duty to vex and oppress the claimant," nor for acts committed by Bailey from mercenary or malicious motives, as referred to in the Senate report, but for acts legitimately done, honestly done, in good faith, and within the scope of his authority as a Government officer, particularly as such acts met Government approval. This constitutional provision, as interpreted by the courts, shows at least the policy of the Government respecting matters of this kind. The acts of Congress recognizing liability and promising immunity to the officer also indicate the policy of the Government in regard to seizures of property by revenue officers on its account and for its benefit, and shows how consistent Congress has been on the subject. If section 989 of the statutes applies only to revenue from imports, Congress has shown an intention by section 3220 to extend its protection to collectors of Internal Revenue as well as collectors of customs. Congress did not intend that either class of revenue officers should be without protection from the consequences of seizing property, Congress meant that provision should be made for indemnity, not only for the benefit of the officer, but those ultimately interested in the result—the creditor who is interested in having his recovery made productive.

The private bill sending Cumming & Co. into the Court of Claims for compensation is also a recognition by Congress that seizures of property by revenue officers in the line of their duty are proper subjects for compensation.

The special act admits that acts of an Internal Revenue officer in seizing property, in the line of his duty,

may entail a liability on the Government for mistakes in the seizure—not that the liability exists in this particular case. That the Court of Claims was to find out, first, by taking proof of the facts, and second, by applying the law to the facts and in assessing the damages.

In other words, these various provisions are to be construed as indicative of a general purpose or policy on the part of the Government that injuries to property, committed while serving Government purposes, are to be compensated for. The annals of all nations enjoying a constitutional government, and of many despotic nations, show that the moral sense of mankind requires compensation where private property is taken, injured or destroyed for government purposes (Mills on Eminent Domain, sec. 1). We are not referring to personal torts of officers, but to the seizure of property for the Government. Governments are supposed to deal justly with its citizens, and when a government casts aside its shield of sovereignty and consents to come into Court as an ordinary litigant its purpose is that justice shall be done as in a controversy between ordinary suitors.

Bailey, as the proofs show, fled the country a short time after the seizure was released, and became a bankrupt fugitive from justice. It would be a mere mockery to tell Cumming & Co. to go through the idle form of seeking redress from him, even if he could be personally holden, which seems impossible after the *avowal* of his act by the Government. He was the chosen agent of the Government, and at the time of the seizure enjoyed its highest confidence, and was clothed with the largest discretion entrusted to any one in the revenue service, having power in his discretion to make seizures in any part of the country. That his high character at the time led the Government into an approval of the act which brought Cumming & Co. into financial ruin does not militate against their claim for redress against the Government, nor does it shield it from the legal consequences of the series of acts performed in its name under the sanction of an authority which it alone could confer. This is especially so in view

of the fact that the Government did not promptly disavow these acts, but permitted their continuance after knowledge of the facts from the reports made by its own appointed Commissioners.

A great wrong has been done, and the Government has to its credit, by the action of the legislative and executive branches of the Government, signified its willingness that the wrongs should be redressed and that justice be done, and the judicial branch of the Government (the Court of Claims) was in effect directed by the special act conferring jurisdiction, to co-operate by ascertaining and assessing the damages sustained, to the end that reparation be made. If there is any virtue in the old maxim that "there is no wrong without a remedy" the small judgment awarded by the Court of Claims should (if not increased) be affirmed, as they do not begin to compensate the injury inflicted.

Even on a contract made by a *public* officer in the line of his official duty the liability is public, not personal (*Olney* vs. *Wicks*, 18 *Johns.*, 122; *Nichols* vs. *Moody*, 22 *Barb.*, 611; *Hill* vs. *Lauderdale*, 46 *N. Y.. at pp.* 74, 75), and this "upon the presumption that the contract was made upon the credit of the Government itself, as possessing an entire ability to fulfill its just contracts, far beyond that of any private man, and that it is ready to fulfill them, not only with good faith, but with punctilious promptitude and in a spirit of liberal courtesy" (*Story on Agency, ch.* 11, *sec.* 302; *Dunlap's Paley's Agency.* 376, 377, *cited in Nichols* vs. *Moody, supra*). The books are full of such cases; but as the rule has settled down to an elementary principle, further citation is unnecessary.

In the United States, the sovereign power is not lodged in a single person, but is distributed among three co-ordinate bodies of men, each of which, within the limits of its jurisdiction, is absolutely independent of the others. The enacting of laws is confided to a body of men called the Legislature; the execution of them is confided to the President, or the Governor, neither of whom acts alone, but in conjunction with certain ministers or chief officers of

State, who act independently of each other, and are responsible to no one, except so far as the Constitution makes them subject to impeachment for crimes and misdemeanors in office. *Now since the sovereign is not, without his consent, answerable before the Judicial Courts at the suit of any one for acts done in his sovereign or political capacity, it naturally follows that any officer who exercises, in a degree however small, or about concerns however petty, any distributive portion of this power, cannot be held thus to answer* (2 *Thompson on Negligence*, 816).

POINT V.

The damages, $36,000, awarded were inadequate, a circumstance of which the Government cannot complain.

The items aggregating the damages allowed are not given, nor is the evidence returned, so that this Court is bound to assume that the damages allowed were legally proved and are properly recoverable. In point of fact these general damages are too small, but the claimants are for the same reason bound to assume they are correct. The Court below, however, improperly disallowed a specific item of $5,300 and the return proves it was disallowed and reasons are given for its disallowance.

By the ninth finding of fact, the Court holds that "During the period in which the business of the claimants was interfered with by Collector Bailey and the revenue officers, as before set forth, the expenses of the firm of Cumming & Co. for rent, insurance and employees continued, and amounted for the period to $5,300" (p. 21), This item ought to have been, but was not, allowed to the claimants,

and the error in disallowing it appears affirmatively by the record. The damages embraced in this item flowed *directly* from the wrong. The claimants were not allowed to do business during the period stated, and the expenses stated were an *actual* loss, which falls under the head of *compensatory* damages. Indeed, the private act under which the Court of Claims acquired jurisdiction, contemplated the allowance of such damages, if they were legally proved (See the Act, *ante* pp. 1, 2).

The damages arose from a natural change of effects, produced and caused by the original wrong, and do not come under the head of *remote or consequential* damages.

Unless compensation can be made as a substitute for that to which a party was entitled and of which he has been more or less deprived, there will be an irreparable injury, and a corresponding failure of justice (*Sutherland on Damages*, 1).

The law defines the scope of responsibility for consequences; beyond that they are supposed to cease, or the injured party to counteract them by preventive measures. The legal scope is a reasonable one; in general it extends so far as the moral judgment and practical sense of mankind recognize responsibility in the domain of morals, and in those affairs of life which are referred to the Court for regulation or adjustment. The law defines it generally by the principle which limits the recovery of damages to those which *naturally* and *proximately* result from the act complained of (1 *Sutherland on Damages*, 19).

Direct damages include all such injurious consequences as proceed immediately from the cause which is the basis of the action ; not merely the consequences which invariably or necessarily result, and are always provable under the general allegation of damages in the declaration; *but also other direct effects which have in the particular* instance naturally ensued, and must be alleged specially to be recovered for. *The liability of the defendant for these, if guilty of the cause, is clear.* All such damages, whether for tort or breach of contract, are recoverable without regard to the defendants' intention or motive, or any pre-

vious actual contemplation of them (*ib.*). A defendant is conclusively presumed to have contemplated the damages which result directly and necessarily or naturally from his breach of contract; *and in cases of tort, his responsibility to this extent is absolute* (*ib.*). These damages are specially claimed by the claimants in their bill or petition (see p. 3). Where property is taken for public use, *just* compensation is compensation for the net injury which is suffered from the exercise of this sovereign right. The word "compensation" implies that a wrong or injury has been inflicted, and must be redressed in money, money must be paid to the extent of the injury. This may be more or less than the value of the property taken; but when compensation has been made to the extent of the injury, the language and just purpose of tho Constitution are satisfied (3 Sutherland on Damages, 432). In this case, the claimants were daily expecting the release of their property. They had the right to expect its release, and hence the expenses of the warehouse went on.

They could do no business, their property was impounded by the Government, and until it was released these expenses were productive of no benefit to the claimants, and were in fact an absolute loss. To say that this loss is *remote* or *consequential*, and not *direct*, is unwarranted by principle or authority.

Where the injury to be recovered for consists of several items variously related consequentially to the alleged cause, the right to each must be decided upon the same principles as where only one irreparable injurious effect is in question (1 Sutherland on Damages, 99). Thus, in an action for negligent driving, whereby the plaintiff's horse was injured, it appeared that the horse was sent to a farrier for six weeks for the purpose of being cured, and that at the end of that time it was ascertained that the horse was damaged to the extent of £20. It was held *that the plaintiff was entitled to recover for the keep of the horse at the farrier's* the amount of the farrier's charges, and the difference in value between the horse at the time of the accident and at the end of the six weeks, but not for the hire of another horse

during the six weeks (*ib.*, 100, citing Hughes *vs.* Quentin, 7 C. & P., 703; Clare *vs.* Maynard, 7 C. & P., 741). *Had a claim been made for the loss of the use of the injured horse during his treatment at the* farrier's, it would have been a proper item of damages (Sutherland, *supra*, citing Albert *vs.* Bleecker St. R. R. Co., 2 Daly, 393; Bennett *vs.* Lockwood, 20 Wend., 223; Walrath *vs.* Redfield, 11 Barb., 368; Gillett *vs.* West R. R. Co., 8 Allen, 560; The Glaucus, 1 Lowell, 366; Sweeny *vs.* Pt. Burwell Harbor Co., 17 Upp. Can. C. P., 574), for as the Court said, in Albert *vs.* Bleecker St. R. R. Co. (2 Daly, at p. 393), "the defendants destroyed for the time being the plaintiff's means of carrying on his trade. It was his duty to replace them within a reasonable time, but the loss sustained *ad interim* was the natural and proximate cause of the wrong done him, and as such was recoverable" (citing several cases).

To the same effect see Clinton *vs.* Townsend, 1 Thompson & Cook, N. Y., 330, and cases cited.

Where the Government suspends work under a contract, and the contractors comply with the government's request, both in suspending work and in subsequently resuming it, they may recover all their actual damages occasioned by the suspension, *including loss occasioned by the non-employment of their hands* (Fighe *vs.* U. S., 8 Ct. of Claims, 319).

The claimants were stopped from running their business, and the damages sought to be recovered were the expenses incidental to running it during the seizure, which was *temporary* only, an expense they could not obviate. The damages were not only incidental to the wrong, but were directly caused by it. The Court below certifies that it disallowed this item (p. 21) so that it was not included in the $36,000 allowed to the claimants.

POINT VI.

The Observance of Revenue Regulations.

The regulations of the Government concerning bonded warehouses was fully complied with, *and the seizure was not made on the ground that any had been violated; no violations were proved and none were found by the Court below.* Concerning the objections raised by the defendants' counsel that the firm of Cumming & Co. was guilty of irregularities under the Treasury regulations which went into operation on the 29th August, 1867, in allowing a clerk or employee to be put forward as the nominal proprietor of the bonded warehouse, and in maintaining their own place of business in the same building, and in keeping a large quantity of free goods on the premises, the Court below said (p. 22): "We are of the opinion that as no actual fraud, concealment, or loss to the revenue is shown, and as these irregularities were much more fully known to the collector of the district and to Commissioner of Internal Revenue than to the Court, and inasmuch as the Treasury Department, having knowledge of the facts, had also exclusive jurisdiction over the subject matter, with power either to order a seizure or to waive an irregularity and remit a forfeiture, and having exclusive jurisdiction determined through the Commissioner of Internal Revenue that no just cause for the seizure of the claimants' property existed, the Court cannot retry the issue properly within the jurisdiction of and actually determined by the Revenue Department, but must regard the decision of the Commissioner as final and conclusive."

There were no irregularities in the bonded warehouse. All the witnesses testified that it was Cumming's warehouse, and Bailey in his letters refers to it as the *Cumming* warehouse.

The cellar of No. 60 was not bonded until Miller's application was granted, The witnesses agree that it was a free cellar, and that the "free goods" were there by the

written permission of the collector. The bonding to Miller was recognised by the Government as both legal and proper.

(*a.*) It was not until the new regulations of August 29, 1867 (series 3, No. 9, page 7), that bonding a warehouse to a distiller was forbidden. Cumming & Co. were not distillers; but as two of the partners who composed the firm of Boyle, Miller & Co., of Cincinnati, were, it was deemed best to have Miller make the application and give the requisite security.

(*b.*) The Government officials knew it was Cumming's warehouse and so testified. An honest business could not be broken up by such a regulation. Some one other than the owners of the whiskies must have given the bonds or the warehouse would have had to be closed. The answer to the supposed irregularity is to be found on page 16 of the regulations as follows: "New applications must be made, new bonds filed. * * * * Such existing warehouses as do not conform to these regulations *must be discontinued.*"

That was the only penalty, yet the Government not only did not discontinue the warehouse, but accepted Thomas Miller, with full knowledge of the facts.

We do not deem it necessary to discuss the capacity of the warehouse, nor many other things in respect thereto that were discussed in the Court below, as the evidence relating thereto forms no part of the return made to this Court, on which the case is to be argued.

POINT VII.

Conclusion.

The judgment of the Court below, appealed from by the Government, should be affirmed, and upon the appeal taken by the claimants the judgment should be increased to the extent of $5,300, as claimed in the Fifth Point, by remanding the cause to the Court of Claims, with instructions to enlarge the claimant's recovery so as to include the amount stated, which addition would make the judgment $41,300 instead of $36,000 as originally awarded.

This power was exercised in the case of the Choctaw Nation *vs.* U. S. (119 U. S. R., at p. 41), and should be applied to the present contention.

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